89-314 (1)

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

THE CITY OF NORMAN, A MUNICIPAL CORPORATION; AND KELVIN WINTER AND DOUG McKENZIE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS DULY AUTHORIZED LAW ENFORCEMENT OFFICERS FOR THE CITY OF NORMAN; AND STEVE CAIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE SUPERVISOR AND A DULY AUTHORIZED LAW ENFORCEMENT OFFICER FOR THE CITY OF NORMAN,

Petitioners,

v.

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE AND KATHLEEN O'ROURKE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the ruling of the Tenth Circuit Court of Appeals that *Payton v. New York*, 445 U.S. 573 (1980) applies only to felony warrants is in conflict with the decisions of other federal and state courts.

II. Whether the United States Court of Appeals, Tenth circuit, erred in ruling that a duly appointed judge of a state or federal court in the State of Oklahoma is restricted from issuing a bench warrant for contempt of court against a person who has refused to respond to a "show cause order", duly served on her, and whether such a bench warrant for contempt may not be served at night even though said warrant requires the person to be brought before the court "FORTHWITH."

III. Whether the United States Court of Appeals, Tenth circuit, erred in ruling that police officers, operating under the instructions of the court which has issued a bench warrant for contempt should disregard the order of the court if the individual is found during the night, when the bench warrant has been issued by a duly appointed Judge and has clearly stated that the individual is to brought before the court "FORTHWITH."

IV. Whether the Judgment of the United States Court of Appeals, Tenth Circuit, was in error in holding that a bench warrant for contempt is a misdemeanor criminal warrant which cannot be served at night without a night endorsement and, therefore, because it was

served at night, it was a violation of the Plaintiffs' rights under the Fourth Amendment of the Constitution of the United States.

V. Whether the decision of the United States Court of Appeals, for the Tenth Circuit, will have a significant, deleterious and perhaps erroneous, impact on the use of bench warrants for contempt by the state and the federal courts.

VI. Whether the Tenth Circuit erred in not ruling that Kelvin Winter and Doug McKenzie, the individual police officer Defendants, and Steve Cain, the individual police officer and supervisor, were entitled to a qualified good faith immunity from the charges that they violated the Plaintiffs' rights under the Fourth Amendment of the Constitution of the United States due to the fact that the accepted practice and procedure of the courts and police of the State of Oklahoma is that bench warrants issued for contempt of court may be served at any time, either during the day or at night.

LIST OF PARTIES

All Petitioners and Respondents are named in the caption. All parties before the United States Court of Appeals for the Tenth Circuit are before this Court.

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No. _____

IN THE

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THE CITY OF NORMAN, A MUNICIPAL CORPORATION; AND KELVIN WINTER AND DOUG McKENZIE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS DULY AUTHORIZED LAW ENFORCEMENT OFFICERS FOR THE CITY OF NORMAN; AND STEVE CAIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE SUPERVISOR AND A DULY AUTHORIZED LAW ENFORCEMENT OFFICER FOR THE CITY OF NORMAN,

Petitioners,

v.

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE AND KATHLEEN O'ROURKE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THE CITY OF NORMAN, ("City of Norman"), KELVIN WINTER ("Winter"), DOUG McKENZIE ("McKenzie"), and STEVE CAIN ("Cain"), the Petitioners herein, ask this Court for a writ of certiorari to review the May 23, 1989, decision of the United States Court of Appeals, Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported at 875 F.2d 1465 (10th Cir. 1989) and is printed in Appendix A hereto, *infra* p. A-1. The Judgment of the United States District Court, Western District of Oklahoma, reported at 640 F. Supp. 1451 (W.D. Okla. 1986) is printed in Appendix B hereto, *infra* p. B-11-12. The unpublished transcript of the Ruling of the Court in the United States District Court for the Western District of Oklahoma is printed in Appendix B hereto, *infra* p. B-1-10.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, (Appendix A *infra*, p. A-1-28) was entered on May 23, 1989. No Petition for Rehearing was filed. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution to the United States which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

and 42 U.S.C. § 1983 which provides as follows:

> Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights action in which Respondents, Michael W. O'Rourke, Shirley M. O'Rourke and Kathleen O'Rourke, ("Respondents") sought actual and punitive damages against the City of Norman, Kelvin Winter and Doug McKenzie, police officers for the city of Norman, and Steve Cain, police officer and supervisor for the City of Norman.

I. FACTUAL BACKGROUND

This action was brought in the United States District Court for the Western District of Oklahoma pursuant to 42 U.S.C. § 1983, with jurisdiction conferred on the District Court by 28 U.S.C. § 1343, which provides for original jurisdiction of that Court in actions authorized by 42 U.S.C. § 1983, and also by 28 U.S.C. § 1331 which provides for original jurisdiction for all civil actions arising

under the Constitution Laws and Treaties of the United States.

The lawsuit in the District Court arose out of the service of a bench warrant for contempt for the arrest of Debora Boyd, the daughter of Michael O'Rourke, who lived at the Respondents' home. The bench warrant which the two police officers, Winter and McKenzie, sought to serve had been issued by Court Clerk of the District Court of Cleveland County, at the direction of the District Judge for Cleveland County. The bench warrant for contempt required that Debora Boyd be arrested and brought before the court "FORTHWITH" for her failure to appear at an earlier show cause hearing on a contempt citation arising out of her failure to comply with the judgment of the court in a small claims case. The two police officers, Winter and McKenzie, attempted to execute the bench warrant at approximately 10:00 p.m. on May 16, 1983. Having a reasonable belief that the Respondents' home was also the home of Debora Boyd, and that in fact Debora Boyd was at home when the officers arrived to arrest her pursuant to the bench warrant, the officers searched the home of the Respondents but did not, however, find Debora Boyd at home.

The Respondents have asserted that the search of the home, incident to the service of the bench warrant on Debora Boyd for contempt, was not authorized because a bench warrant could not be served at night without a night endorsement for the reason that the underlying offense, contempt of court, is a misdemeanor under Oklahoma law.

Petitioners, The City of Norman and the individual police officers, asserted that a bench warrant is *sui generis*, being neither civil nor criminal in nature, but rather is an order of the court to bring the individual before the court at any time the individual may be found, be it at night or day, and that a search of the individual's home, incident to the service of the bench warrant, is reasonable under the Fourth Amendment if the officers have probable cause to believe the individual is within. Furthermore, Petitioners asserted that the individual police officers were acting in good faith while relying on the training they had received, the established police procedure, and on instructions concerning the service of bench warrants provided to them by their superiors. Because it was the policy and procedure of the City of Norman, as it is throughout the State of Oklahoma, that bench warrants may be served at any time, day or night, the individual police officer Defendants asserted the defense of qualified immunity. ("Defendants' Contentions" Final Pre-Trial Order, p. 18, filed May 5, 1986.)

II. ISSUES AND RULINGS BELOW

The distinction between bench warrants and criminal warrants was repeatedly raised in briefs in the district court case. In the Defendants' Pre-Trial Memorandum, Petitioners asserted that a bench warrant "is neither a felony nor misdemeanor warrant, but a warrant issued by a competent judge of a competent jurisdictional court for the arrest and bringing before the court one Debora Boyd" for contempt. (Pre-Trial Memorandum of Defendant's, p. 4, filed June 27, 1986.)

In their trial brief, the Petitioners argued that there is no requirement for a night endorsement on a bench warrant for contempt for the reason that a bench warrant is "an Order of the Court to bring a person to bar at the convenience of the Court for the person's failure to comply with Court Orders." (Trial Brief of all Defendants, p. 6-7. filed January 29, 1986). Respondents on the other hand asserted that contempt of court is a misdemeanor and, therefore, a bench warrant to bring an individual before the court for failure to appear at a hearing on a contempt citation was a misdemeanor warrant requiring a nighttime endorsement. (Plaintiffs' Trial Brief, p. 16-18.)

Petitioners also asserted that the individual police officers, Winter, McKenzie and Cain, were entitled to the defense of immunity under the objective standard of good faith in that they acted reasonably in relying on their training and routine police procedures as to the service of bench warrants. (Trial Brief of all Defendants, p. 6.)

At the close of the trial in the District Court, in his oral ruling, Judge Bohanon stated that a bench warrant is an order of the court to arrest the individual "and bring her to court. It's a command without qualification. Without limitation of any kind so far as I can see. It's not a misdemeanor warrant nor is it a felony warrant. It's a bench warrant. An Order of the Court." (Official Court Reporter's Transcript of the Ruling of the Court held on May 27, 1986, Appendix B, p. B-4.)

In the Judgment filed on June 19, 1986, Judge Bohanon stated as a conclusion of law that contempt pro-

ceedings are *sui generis,* neither civil or criminal, but rather within the power of the court to enforce obedience to its orders. (Appendix B, p. B-31.) Furthermore, Judge Bohanon stated that "during the time period relevant to this case, all contempts were felonies under Oklahoma law, and . . . when Officers Winter and McKenzie searched the residence of Debora Boyd on May 16, 1983, they were doing so pursuant to a felony warrant for her arrest." (Appendix B, p. B-35.)

Judgment having been rendered for all of the Defendants by Judge Bohanon, the Plaintiffs appealed. In the Plaintiffs-Appellants' Brief-in-Chief, Plaintiffs set out the issues which they were presenting for review. In summary, the primary issue presented the by Plaintiffs on appeal was whether the District Court had erred in finding that a bench warrant was a felony warrant rather than a misdemeanor warrant, and therefore, whether a bench warrant may be served at night. A subsidiary issue presented was whether, if the bench warrant was a misdemeanor warrant, the police officers could search the O'Rourke's home. (Plaintiffs-Appellants' Brief-in-Chief, pp. 2-3.)

Although not stated as an issue presented on appeal, the Plaintiffs raised the question of right of the police officers, Winter, McKenzie and Cain, to claim good faith reliance on the police procedures as a basis for qualified immunity. (Plaintiffs-Appellants' Brief-in-Chief, pp. 34-35.)

In the opinion of the United States Court of Appeals for the Tenth Circuit, the appellate court held that the search of the O'Rourke's home at night without a night

endorsement on the warrant was unreasonable under the Fourth Amendment. For this reason, they reversed the district court and held the City of Norman liable to the Plaintiffs. The rationale for this determination was that at the time of the nighttime search of the O'Rourke home, contempt had been defined as being *sui generis* under Oklahoma law, and therefore it was not a felony and required a night endorsement in order to be served during the nighttime hours. (Appendix A, pp. A-14–17.) Also, the appellate court held the police officers, Winter, McKenzie and Cain, liable for damages to the Plaintiffs jointly with the City of Norman. The appellate court did not, however, consider the issue of qualified good faith immunity of the individual police officers. (Appendix A, p. A-27.)

On appeal, the United States Court of Appeals, Tenth Circuit, did not consider the ruling of the court that a bench warrant was neither a felony warrant nor a misdemeanor warrant but rather concentrated solely on the question as to "whether the bench warrant issued for contempt of court was a felony warrant under Oklahoma law." Considering the law of the State of Oklahoma concerning contempt, the court found that the District Court erred in classifying contempt as a felony and that "the search of the O'Rourke home at 10:00 p.m. without a nighttime endorsement on the warrant was unreasonable under the Fourth Amendment." (Appendix A, p. A-26.) For this reason, the United States Court of Appeals, Tenth circuit, reversed the District Court on this issue.

The Tenth Circuit Court of Appeals stated, in regard to the authority of the police to search a home pursuant to the arrest warrant when they have reason to believe that the suspect is within, that *Payton v. New York,* 445 U.S. 573 (1980) only applies to an arrest warrant for a felony, but does not apply to a misdemeanor, such as contempt, as in this case. (Appendix A, p. A-9, footnote 7.)

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari for the reasons set out below.

I.

The ruling of the Tenth Circuit Court of Appeals that *Payton v. New York,* 445 U.S. 573 (1980) applies only to felony warrants is in conflict with the decisions of other federal and state courts.

Certiorari should be granted to consider the effect of the determination by the Tenth Circuit Court of Appeals that *Payton v. New York,* 445 U.S. 573, (1980) gives authority to search the home of the suspect only if the arrest warrant is for a felony.

The opinion of the Tenth Circuit Court of Appeals refers to *Payton v. New York,* 445 U.S. 573 (1980) and states that the "*Payton* dictum will not support the police action for the Court's discussion there related to an arrest warrant for a felony . . . not a contempt as in this case, which is not a felony." (Appendix A, p. A-9, footnote 7.) This statement is in conflict not only with decisions in

other cases concerning this issue, but in fact with the language of *Payton* itself. In fact, *Payton* does not mention a felony arrest but only "an arrest warrant." Other courts have applied *Payton* with regard to entry to effect arrest to misdemeanor arrest warrants. See *U.S. v. James,* 408 F.Supp 527 (D.C. Miss. 1976) and *People v. Sain,* 461 N.E. 2d 1043 (Ill. 1984). In *State v. Jones,* 503 A.2d 802 (N.H. 1985) the Court applied *Payton* to bench warrants. Petitioners assert that *Payton* authorizes a limited invasion of the suspect's home when it is necessary to arrest him in his house, whether it be for a felony or a misdemeanor, and that the language of the Tenth Circuit Court of Appeals which limits *Payton* to felonies, is in conflict with the rulings of other state and federal courts.

II.

The Court of Appeals erred in ruling that a bench warrant is a misdemeanor warrant which may not be served at night without a night endorsement by the court.

The Court of Appeals erred in holding that a bench warrant was a misdemeanor warrant and therefore cannot be served at night without a night endorsement. Judge Bohanon held that a bench warrant for contempt of court was simply an order of the court to bring the individual before the court "FORTHWITH" and was neither a felony warrant nor a misdemeanor warrant. Nevertheless, in his Conclusions of Law, Judge Bohanon ruled that it was a felony warrant. Confusion over the nature of bench warrants in Oklahoma arises out of the fact that they are

not clearly defined under Oklahoma statutory law, nor has their fundamental nature ever been considered by the courts of the State of Oklahoma. Given this confusion, if it was error for Judge Bohanon to rule that bench warrants for contempt of court were felony warrants, then it was equally erroneous for the Court of Appeals to rule that they are misdemeanor warrants. The question of whether a bench warrant for contempt of court may be served at any time, day or night, or requires a night endorsement to be served during the nighttime hours, depends on the fundamental nature of the bench warrant itself.

The question in this case is not whether the bench warrant which the Defendant police officers were attempting to serve on Debora Boyd was a felony warrant or a misdemeanor warrant, but rather whether a bench warrant for contempt is neither a felony nor misdemeanor warrant. Although this issue was raised by the Defendants in the lower court (Trial Brief of all Defendants, p. 6-7) and the Trial Judge himself ruled that bench warrant is "not a misdemeanor warrant nor is it a felony warrant. It's a bench warrant. An order of the court." (Appendix B, Ruling of the Court, p. B-4), the Judge also ruled that Debora Boyd's underlying defense, contempt of court, was a felony and therefore when "officers Winter and McKenzie searched the residence of Debora Boyd on May 16, 1983, they were doing so pursuant to a felony warrant for her arrest." (Appendix B, Judgment, p. B-35.)

On appeal, the appellate court found that the District Court had erred in its conclusions of law and in its deter-

mination that contempt was a felony in Oklahoma at all times relevant to the case. The appellate court ruled that under state criminal law contempt is a misdemeanor and the bench warrant issued by the Cleveland County District Court was limited to daytime execution and, therefore, the attempted execution and search of Debora Boyd's home was unreasonable under the Fourth Amendment.

The question of whether a bench warrant issued by the court for the parties' failure to obey an order of the court is neither a felony warrant nor a misdemeanor warrant was not addressed by the court. The nature of bench warrants for contempt, as opposed to felony and misdemeanor warrants, has never been addressed by the courts of Oklahoma. However the training police officers receive and the uniform practice throughout the State of Oklahoma is that the bench warrant is neither a felony warrant nor a misdemeanor warrant and may be served at any time, day or night.

In view of the distinction between arrest warrants and bench warrants and considering that only arrest warrants are subject to restrictions against night service, as to whether they are felony arrest warrants or misdemeanor arrest warrants, the question of the distinction between bench warrants and criminal arrest warrants should have been, but was not, addressed by the appellate court.

III.

The question to the nature of bench warrants should have been certified to the Supreme Court or the Court of Criminal Appeals of the State of Oklahoma

If in the absence of clear statutory language as to the nature of bench warrants, as distinguished from felony arrest warrants and misdemeanor arrest warrants, and in the absence of case law from the Supreme Court of the State of Oklahoma concerning this distinction, the issue should have been certified to Supreme Court of the State of Oklahoma. The Court of Appeals for the Tenth circuit erred when it assumed, without authority, that bench warrant for contempt is either a felony warrant or a misdemeanor warrant depending on whether the underlying offense was a felony or misdemeanor. The validity of the nighttime service of the bench warrant on Debora Boyd, and the search of Debora Boyd's home incident to that bench warrant, depends on the determination of the issue of whether the bench warrant is a criminal arrest warrant and subject to the statutory provisions dealing with nighttime service of criminal arrest warrants.

IV.

Certiorari should be granted to consider the issue of the right of the individual police officers, Winter, McKenzie and Cain, to good faith immunity against charges that the service of the bench warrant was a violation of the plaintiffs' civil rights.

The Petitioners point out that although the issue of good faith qualified immunity of the individual police

officers was raised on appeal, this matter was never addressed by the appellate court. The procedures of police departments through the State of Oklahoma is that bench warrants are neither felony warrants nor misdemeanor warrants but are orders of the court requiring the officer who serves the bench warrant to bring the individual before the court whenever he may be found, day or night. Even if the City of Norman was found to be liable to the Plaintiffs because the night service of the bench warrant, and the search of the O'Rourke's home incident thereto, the Court of Appeals erred in not considering the qualified good faith immunity defense of the individual police officers.

In reversing the District Court, in addition to holding the City of Norman liable for search of the O'Rourke home without a nighttime endorsement on the bench warrant, the court also held that the police officers, Winter, McKenzie and Cain, were also liable because "they should have known that the nighttime execution of a daytime warrant in a family residence was unreasonable under the Fourth Amendment." (Appendix A, p. A-27.) In the absence of case law to the contrary, and considering the fact that police officers are taught, and it is universally the practice in the State of Oklahoma, that bench warrants may be served on the party at any time, day or night, the question of whether the officers were entitled to good faith immunity should have been addressed by the appellate court and it was error not to do so.

When police officers perform their duties in reliance on their training and procedures of the governmental enti-

ty to which they are responsible, they are entitled to a qualified good faith immunity. Generally, public officials are entitled to qualified or "good faith" immunity with regard to the performing of discretionary duties insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 456 U.S. 800 (1982). Furthermore, good faith is measured by objective standards, not subjective standards. *Id.* pp. 818-820. Once the public official has found that he was acting in his official capacity and was within the scope of his discretionary authority, the plaintiff has the burden of showing the want of good faith. This requires more than a showing of mere negligence. *Garris v. Rowland,* 678 F.2d 1264 (5th Cir. 1982). For the appellate court to have ruled that the individual defendants, police officers Winter, McKenzie and Cain, were liable without consideration of whether they were entitled to the good faith defense, was error.

RELIEF REQUESTED AND CONCLUSION

The Petitioners assert that the appellate court erred in its determination that the bench warrant for contempt of court, and the search of the Respondents' home incident thereto, was in violation of the Respondents' Fourth Amendment rights because the bench warrant was a misdemeanor warrant and could not be served at night without a night endorsement. In the absence of Oklahoma Statute or case law as to the nature of bench warrants, the decision of the appellate court creates a situation which may result in chaos in the state and federal courts in Oklahoma as to the use of bench warrants. Historically,

bench warrants in Oklahoma have been used by both the state and federal courts to bring individuals before the court at any time during the day or night. They are regarded as order of the court, within the inherent power of the court to enforce its orders. The Petitioners recognize, however, that there is a state of confusion as to the nature of bench warrants issued for contempt of court. In light of this confusion, the appellate court had within its power to certify the question to the Supreme Court of the State of Oklahoma. Furthermore, the appellate court failed to consider the good faith defense of the individual police officers. Petitioners request the Court grant the Petition for Certiorari in order to correct the decision of the United States District Court for the Tenth Circuit.

Wherefore, the Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,
LOONEY, NICHOLS, JOHNSON & HAYES

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APPENDICES

APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. CIV-85-10-B

FILED
United States Court of Appeals
Tenth Circuit

MAY 23, 1989

ROBERT L. HOECKER
Clerk

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE and KATHLEEN O'ROURKE,
Plaintiffs—Appellants,

v.

THE CITY OF NORMAN, a Municipal Corporation; KELVIN WINTER and DOUG McKENZIE, individually and in their official capacity as duly authorized law enforcement officers for the City of Norman; and STEVE CAIN, individually and in his official capacity as police supervisor and a duly authorized law enforcement officer for the City of Norman,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Michael Salem of Salem Law Offices, Norman, Oklahoma, and Louis W. Bullock of Bullock & Bullock, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Burton J. Johnson (Patricia D. Herron, Assistant City Attorney, Norman, Oklahoma, with him, on the briefs), of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendants-Appellees.

Don Ed Payne of Payne & Welch, Hugo, Oklahome, and Louis F. Cooper, Bethesda, Maryland, filed an Amicus Curiae brief, for American Civil Liberties Union of Oklahoma; Arthur B. Spitzer and Elizabeth Symonds, Washington, D.C., filed an Amicus Curiae brief, for American Civil Liberties Union of the National Capital Area; Karen L. Long of Watson & McKenzie, Oklahoma City, Oklahoma, filed an Amicus Curiae brief, for Oklahoma Education Association.

Before McKAY, BRIGHT* and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

This is an appeal from a judgment against the plaintiffs in a nonjury trial. *O'Rourke v. City of Norman,* 640 F. Supp. 1451 (W.D. Okla. 1986). The plaintiffs' claim alleged a violation of 42 U.S.C. § 1983 arising from the nighttime search of their home pursuant to a daytime bench warrant for contempt issued by a small claims

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*The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

court. Basing its decision on extensive findings of fact and erroneous conclusions of law, the district court awarded the defendants attorney's fees and costs totalling $19,956.34 from Michael Salem, plaintiffs' attorney, pursuant to Rule 11 and 28 U.S.C. § 1927, and $2,098.85 from the plaintiffs pursuant to Rule 11. These awards are also on appeal, and the cases are consolidated here.

The plaintiffs make the following conclusions and requests for relief from this Court:

1. The ruling of the trial court that the bench warrant was a felony and not a misdemeanor should be reversed as provided herein.

2. The ruling of the trial court that the invalidity of the bench warrant under state law is not relevant to a federal civil rights action should be reversed and appropriate declaratory relief and damages entered against Defendants, or in the alternative, this matter remanded for a new trial.

3. The policy, practice, procedure or custom of the Defendant City of permitting searches of homes incident to bench warrants and misdemeanors and in the absence of exigent circumstances should be declared unconstitutional as a violation of the Fourth Amendment.

4. The sanctions imposed against Plaintiffs and their counsel should be reversed.

5. This Court should enter an order of recusal and random reassignment of this action in the district court.

> 6. This Court determine the prevailing party for the purposes of this appeal and make an order providing for costs and attorneys fees as provided by 42 U.S.C. Section 1988.

Appellants Brief-in-Chief at 49.

Because we find that the district court erred in its conclusions of law which were at the very core of this § 1983 claim, we REVERSE. Consistent with this reversal and plaintiffs' success on the substance of their complaint, we also REVERSE as to costs and attorney's fees awarded the defendants, and REMAND on the issue of costs and attorney's fees for the plaintiffs as provided by 42 U.S.C. § 1988.

I.

The following facts are relevant to this decision.[1] On May 16, 1983, at approximately 10:00 p.m., Officers Winter and McKenzie of the Norman Police Department in Oklahoma arrived at the home of the O'Rourkes to ex-

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[1] We have adopted only the facts set out in this opinion. Our failure to rule on the district court's finding of facts to support "probable cause" should not be construed as our acceptance of the district court's reasoning, e.g., we do not hold that it was reasonable for a police officer to assume that the plaintiffs were lying because the officer "had on previous occasions encountered deceit and hostility in dealing with other members of the O'Rourke family, noteably [sic] the son Wesley, in a criminal context." *O'Rourke,* 640 F. Supp. at 1460. Our legal system has a long-time aversion to "corruption by blood." *Loving v. Virginia, 388 U.S. 1, 7, (1967); Korematsu v. United States,* 323 U.S. 214, 242-43 (1944) (Jackson, J., dissenting), *reh'g denied,* 324 U.S. 885 (1945); *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942).

ecute a state, daytime bench warrant for contempt.[2] The warrant was to be served on Deborah Boyd, the O'Rourkes' emancipated daughter. Obvious from the face of the warrant was that: (l) the order authorized the arrest of Deborah Boyd for contempt; (2) the warrant was issued on February 22, 1983—three months prior to its execution; (3) it was not endorsed for nighttime execution; and, (4) the warrant was issued for failure to appear in a small-claims proceeding as designated by "SC" before the warrant number.[3] Nevertheless, despite all of these factors,

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[2] The execution of the warrant was precipitated by a telephone call to the Norman Police Department by Linda Robillard, the mother of Claire Robillard. Claire Robillard was also on the line. Linda Robillard conveyed that her daughter had a judgment against Deborah Boyd and a warrant out for her arrest. Robillard told the operator at the Norman Police Department that Deborah Boyd normally lives out of town." She was in town for a child support issue. "She lives, when she's in Norman, with her parents at 2602 Chateau." Robillard said she wasn't sure if the address was 2602 or not. The operator asked if Deborah Boyd were there now. Robillard answered, "I'm not certain of that." Claire Robillard told the operator "If you go late at night you know she's there because she has a baby." Again the operator asked whether she was there or not. Linda Robillard replied, "Well I've been told that she is, and it's possible the police could go there tonight and she would be there." The operator then replied, "O.K., well, we'll see what we can do tonight."

[3] Captain Darian DeBolt was unsure of what "SC" designated since "we rarely, if ever, serve these types of warrants." Investigation, Conclusion, and Recommendations Concerning Complaint 83-09, Section 8, p. 4. In the same memorandum he quoted Officer Winter as also ignorant of what "SC" designated. *Id.*

police officers Winter and McKenzie entered the O'Rourke home at 10:00 p.m. (*O'Rourke,* 640 F. Supp. at 1455.) They asked if Deborah Boyd were there; the O'Rourkes answered in the negative and this was undisputed at trial.[4] (*O'Rourke,* 640 F. Supp. at 1456.) Mr. O'Rourke, doubtful of the legality of the nighttime search of his home, telephoned the Norman Police Department and spoke with Lt. Cain, the supervisor on duty. Lt. Cain informed Mr. O'Rourke that he already knew of the search and that "if the officers had a warrant for Boyd's arrest and probable cause to believe that she might be in the residence, they did not need a search warrant and did have a right to enter the residence and search for Boyd." (*O'Rourke,* 640 F. Supp. at 1456.) Lt. Cain did not address the validity of the nighttime execution of a daytime bench warrant, whether Deborah Boyd was at the home, or whether, indeed, the O'Rourke home was Deborah Boyd's residence or a third party residence. The conversation terminated with Mr. O'Rourke informing Lt. Cain that the officers did not have his permission to search his home. (*O'Rourke,* 640 F. Supp. at 1456.) Mr. O'Rourke then called upon his daughter, Kathleen, and wife to witness his statements to the police officers that he would not interfere with the search, but was not in any way consenting to it. (*O'Rourke,* 640 F. Supp. at 1456.) At trial, Lt. Cain testified he would not have stopped the officers from searching.

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[4] The district court found that the O'Rourkes' home was also the residence of Deborah Boyd.

The police officers searched every room in the O'Rourke home. They even searched a bedroom in which the O'Rourkes' two year old grandson lay sleeping. It was undisputed at trial that the police officers were courteous and the district court so held. (O'Rourke, 640 F.Supp. at 1457.) Deborah Boyd was not in the O'Rourkes' home at the time of the search, nor was there any evidence that she had been.

At trial, the defendants called as an expert witness, Samuel Chapman, a Professor of Political Science at the University of Oklahoma and instructor at the Norman Police Academy. He acknowledged instructing many of the Norman police officers, including some of the defendants, and opined that the police officers "performed within the context of accepted police practice." Furthermore, he agreed with or recalled making comments to the effect that "[w]hether or not it's the person's residence is not the obligation of the Police. They are looking for a person; not a residence . . . . If it's the home of a third person and she does not live there, but probable cause exists to believe she is there, it's not intrusive and improper police procedure to search." Clearly he did not have a working knowledge of *Steagald v. United States,* 451 U.S. 204 (1981), decided three years prior.[5] Chapman went on to testify that the search of the O'Rourkes' home was not

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[5] In *Steagald* the Supreme Court held that the search of a third-party residence for the subject of an arrest warrant requires a search warrant. *Id.* at 212-13.

a search at all—it was merely a "recognizance." This is contrary to all Fourth Amendment law known to this Circuit.[6]

Also admitted into evidence and relevant to this appeal was a copy of an "Office Memorandum" written by Norman Police Captain DeBolt, and addressed to City of Norman Police Chief, Don Holyfield. The subject was "Investigation, Conclusion and Recommendations Concerning Complaint 83-09." Complaint 83-09 was filed by Mr. O'Rourke on the evening of the search. In pertinent part, the office memorandum contained erroneous conclusions of law—in fact, very old law. As to the authority of the police to make a home arrest pursuant to an arrest warrant, the memo cited *Jones v. United States,* 357 U.S. 493 (1958); *Dorman v. United States,* 435 F.2d 385 (D.C.Cir.1970). There was no mention of *Payton v. New York,* 445 U.S. 573 (1980), the Supreme Court's constitu-

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[6] On the last day of trial, while explaining the justifications for a verdict against the plaintiffs and sanctions, the trial judge stated:

> I want to say further, that the expert, Noah Goddard who came here from Tecumseh, Kansas and testified as a plaintiff's expert witness and Dr. Chapman testified as the defendant's expert witness and from Dr. Chapman's examination and cross examination of Mr. Goddard, to me, you completely destroyed his testimony. It wasn't worth a nickel. Mr. Goddard's testimony absolutely was void of any credibility at all.
>
> On the other hand, Chapman has been an instructor and he's done much with the City of Norman and he's capable and he's trained and has trained and continues to train the Norman City Police Officers and he's to be commended for his work as such. (Tr., Vol. XXI, Ruling of the Court, p. 9.)

tional mandate at the time of the search and for the three years prior.[7] Also contained in the memo was the following statement, "Appellate courts are not clear on this issue. Some courts have affirmed the power of the police to search residences not that of the defendant, if they have probable cause to believe that the defendant is therein; others have denied that power." Obviously the Captain was ignorant of *Steagald*, controlling law at the time and for the two years prior. In the same memo, Captain DeBolt declared the search of the O'Rourke home illegal because the warrant was improperly served in the nighttime.[8] At trial, Norman Police Chief Don Holyfield

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[7] In *Payton*, the Supreme Court in a dictum stated that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within.*" *Id.* at 603 (emphasis added). This *Payton* dictum will not support the police action for the Court's discussion there related to an arrest warrant for a felony, *id.* at 602, not a contempt as in this case, which is not a felony, as we discuss *infra*, slip op. at 11-15. Moreover, the police officer's conversation with the O'Rourkes relating to the absence of Deborah Boyd from the premises left police without any reason to believe the suspect was within that dwelling. Finally, that dictum in *Payton* does not undercut the determination in the *Steagald* case that an arrest warrant for a third person will not justify the search of the homeowner who is not named in the warrant. Such a search violates the homeowner's rights under the fourth amendment. *Steagald*, 451 U.S. at 211-16.

[8] For nineteen months plaintiffs sought unsuccessfully to obtain the information contained in this memo, dated June 10, 1983. Plaintiffs' original complaint was filed January 2, 1985. Discovery was requested and defendants failed to comply. On August 8, 1985, plaintiffs filed a Motion to Compel Discovery.

testified that he read the report of Captain DeBolt and agreed with it, but questioned *only* the paragraphs relating to the necessity of a night endorsement for a bench warrant.

Quoting from appellants' brief, "The facts of this case start small,[9] but like a[n] . . . avalanche, sweep down the constitutional slope of the Fourth Amendment and to date have gathered a record on appeal approaching 1000 pages and a trial transcript of over 1250 pages."

II.

A.

The prerequisite question we must address is whether the bench warrant issued for contempt of court was a felony warrant under Oklahoma law. If it were a felony warrant, nighttime execution would have been authorized under Oklahoma law, and constitutionally valid. The district court held that contempt in Oklahoma was a felony at all relevant times to this case. The basis for its determination was federal criminal law, common law, and *de novo* statutory interpretation. We disagree with its determination, and the legal reasoning used to arrive at it.

It is axiomatic that the states, acting pursuant to the Tenth Amendment's "police powers," define state crim-

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[9] The small claims judgment against Deborah Boyd resulted from a debt owed to her roommate, Claire Robillard, amounting to $125.00. When she failed to appear to show cause for nonpayment the bench warrant was issued.

inal law.[10] At issue, here, in this § 1983 action is whether federal criminal law or common law defining contempt is a basis for defining contempt in Oklahoma, irrespective of contrary Oklahoma judicial interpretation spanning the past forty years.

Since the federal government is strictly limited by the powers enumerated in the Constitution, Congress may only criminalize an activity if it is acting pursuant to an enumerated power. We have seen the genesis of federal criminal law with the Mail Fraud Statute[11] enacted in 1872 pursuant to the postal power. Later, under the taxing power, Congress enacted the federal tax crimes.[12] However, for most federal criminal laws in the past century, the jurisdictional basis is the Commerce Clause[13] set forth in Article I, Section 8. Put simply, absent Constitutional

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[10] In the Constitution, the power to regulate criminal law has been left to the individual States and this power cannot be abridged by Congress. All the federal government can do is insure that the States do not, via police powers "invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution." T. Cooley, 7th ed. (1903), *A Treatise on the Constitutional Limitations* at 830-32.

[11] 18 U.S.C. § 1341.

[12] 26 U.S.C. §§ 7201, 7202, 7203, and 7206.

[13] In 1901, pursuant to the Commerce Clause Congress passed an Act for the Suppression of Lottery Traffic. In *Champion v. Ames*, 188 U.S. 321 (1903), this Act was held constitutional. In 1910, based on Congress' authority to regulate commerce, Congress enacted the Mann Act which was held constitutional in *Hoke v. United States*,

violations, there is no jurisdictional basis for a federal judge to redefine state criminal law. As such, we hold that it was error for the district court to look to federal criminal contempt to decide that contempt in Oklahoma may be a felony; therefore, it is a felony.[14] *O'Rourke,* 640

Footnote 13 continued from previous page.

227 U.S. 308 (1913). These two cases laid the foundation for Congressional enactment of our modern federal criminal law with federal jurisdiction relying on the Commerce Clause. *Perrin v. United States,* 444 U.S. 37, *cert. denied,* 444 U.S. 990 (1979) (Travel Act, 18 U.S.C. § 1952, requires an interstate commerce nexus); *United States v. Bass,* 404 U.S. 336 (1971) (the Supreme Court held that in a prosecution under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. App. § 1202(a), interstate commerce nexus must be proven; otherwise 1202(a) dramatically intrudes upon traditional state crime jurisdiction, *id* at 349-50); *Perez v. United States,* 402 U.S. 146 (1971) (loansharking, a federal crime under the Consumer Credit Protection Act, 82 Stat. 159, 18 U.S.C. § 891, is a permissible exercise by Congress of its powers under the Commerce Clause); and *United States v. Elders,* 569 F.2d 1020 (7th Cir.1978) (in prosecution under 18 U.S.C. § 1951, the Hobbs Act the court held that there was a nexus required between the extortionist conduct and interstate commerce).

[14] In addition to using federal law and common law as a basis, the district court reasoned that since the Oklahoma statute defining contempt imposed no limitation on potential punishment, contempt was a felony. It cited to *Soetarto v. Immigration and Naturalization Service,* 516 F.2d 778, 781 (7th Cir. 1975), as authority, and held that "during the time period relevant to this case, all contempts were felonies under Oklahoma law ...." *O'Rourke,* 640 F. Supp. at 1463. *Soetarto* involved the question of whether or not a conviction in the Netherlands for the theft of about $135 and a ring valued at approximately $100 was a crime or "moral turpitude" as the term was used within the deportation statute.

F. Supp. at 1462. The district court devoted three full pages of analysis to contempt, but not once did it cite an Oklahoma case. The disregard of forty years of interpretation by Oklahoma courts was a violation of the Tenth Amendment. The federal court must look to state criminal law as judicially interpreted by the state courts, and we do so, here.

B. Contempt Under Oklahoma Law

Until 1982, the Court of Criminal Appeals of Oklahoma and the Oklahoma Supreme Court were not in harmony over the nature and classification of contempt. *Gilbert v. State,* 648 P.2d 1226, 1230 (Okla. Crim. App. 1982). However, on one crucial point they were always in accord—contempt was not a felony in Oklahoma.

As early as the 1940's, the Oklahoma Court of Criminal Appeals defined contempt as a misdemeanor at most. *Brown v. State,* 209 P.2d 715, 720 (Okla. Crim. App. 1949) (basing its determination on Okla. Stat. tit. 21, § 565 (1941) "Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court," the Oklahoma court held that in the absence of express provisions making the offense of contempt a felony, one found guilty thereof cannot be punished by confinement in the penitentiary.[15] The sentence of the defendant herein to the

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[15] At the time of the search in the O'Rourke home, Okla. Stat. tit. 21, § 566 (1981) provided:

> "[p]unishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court."

The wording of the statute was precisely that construed in *Brown.*

penitentiary was in excess of the court's power to pronounce. *Id.* at 720)). *Brown* also announced that contempt in Oklahoma is controlled by mandatory state constitutional and state statutory provisions and *not by common law. Id.* at 719. In essence, in 1949, contempt in Oklahoma was defined by Okla. Stat. tit. 12, § 1390 (1941); Okla.Stat. tit. 21, §§ 565-568 (1941); and, Const. art. 2, § 25 as judicially interpreted in *Brown. Id.* This was later affirmed in *Seay v. Howell,* 311 P.2d 207 (Okla. 1957) (contempts of court are defined by Constitution and statute and not by common law). *Id.* at 209. In 1972, *Roselle v. State of Oklahoma,* 503 P.2d 1293 (Okla. Crim. App. 1972), consistent with *Brown* held that the "crime" of contempt was a misdemeanor. *Id* at 1295. Citing to Okla. Stat. tit. 21, § 566 (1971), "Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court," the court reasoned that since the statute does not specify whether contempt is a felony or misdemeanor, the definition of "imprisonment" would be determinative. In the ordinary sense "imprisonment" contemplates the common jail, rather than the penitentiary; therefore, the crime of contempt is a misdemeanor. *Id.*

In another line of cases, the Oklahoma Court of Criminal Appeals defined contempt as *sui generis,* i.e., not civil or criminal. *Pate v. State,* 429 P.2d 542, 547 (Okla. Crim. App. 1967); *Sullivan v. State,* 419 P.2d 559, 560 (Okla. Crim.App. 1966) (citing *Fulreader v. State,* 408 P.2d 775, 776 (Okla. 1965).

In 1982, the Court of Criminal Appeals of Oklahoma followed the Oklahoma Supreme Court and declared that

direct contempt proceedings "are neither civil nor criminal in character but are *sui generis.*" *Gilbert v. State,* 648 P.2d 1226, 1230 (Okla. Crim. App. 1982) (citing *State ex rel. Young v. Woodson,* 522 P.2d 1035, 1039 (Okla. 1974); *Fulreader v. State,* 408 P.2d 775, 776-77 (Okla. 1965); *State ex rel. Short, Att'y Gen. v. Owens,* 256 P. 704, 708-09 (Okla. 1927)). The appellant in *Gilbert* was seeking the classification of contempt as a misdemeanor so that he would be "formally arraigned and provided a jury trial." *Id.* at 1228. By classifying contempt as *sui generis*, these rights could no longer be claimed. The court declared that no such rights attached since contempt was now *sui generis* and "[a]ll prior holdings to the contrary *on this point* are overruled . . . ." *Id.* at 1231 (emphasis added). Therefore, at the time of the nighttime search of the O'Rourke home in 1983, contempt was defined as *sui generis* under all Oklahoma law.

The categorization of contempt as not a felony is pivotal to the outcome of this case. Under Oklahoma law, if the warrant is issued for commission of a crime defined as a felony, no nighttime endorsement is required. The warrant may be served day or night. Okla. Stat. tit. 22, § 189.[16] Also under Oklahoma law, persons charged with misdemeanors may not be subject to arrest at night unless

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[16] Section 189 reads:

> **Arrest, when made**
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> If the offense charged is a felony. the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate endorsed upon the warrant.

a judge determines it necessary. Okla. Stat. tit. 22, § 189.[17] Only after an assessment of necessity may the judge add an endorsement permitting nighttime execution. The classification of contempt as *sui generis* does not vitiate this requirement, it strengthens it. Absent legislative authority for day or nighttime service, it is for the issuing magistrate to determine the reasonableness of a nighttime execution. *Wiggin v. State,* 755 P.2d 115, 116 (Okla. Crim. App. 1988); *Fletcher v. State,* 735 P.2d 1190, 1193 (Okla. Crim. App. 1986); *Yates v. State,* 117 P.2d 811, 813 (Okla. Crim. App. 1941).

The bench warrant for the arrest of Deborah Boyd had no nighttime endorsement. For search and seizure purposes, nighttime in Oklahoma starts thirty minutes after sunset and ends thirty minutes before sunrise. Okla. Stat. tit. 47, § 11-801(b) (1981).[18] The search of the O'Rourke home at 10:00 p.m. was well after sunset.

In sum, the district court was clearly in error in its classification of contempt as a felony in Oklahoma. First it looked to federal criminal law for guidance. Federal criminal law does not define state criminal law. Second, it

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[17] *Id.*

[18] Although there was no Oklahoma *case* construing "nighttime" in 1983, Okla. Stat. tit. 47, § 11-801 (1981) was in effect since 1981 and was later used in *Fletcher,* 735 P.2d at 1197, as the controlling definition for search and seizure purposes. We also note that Okla.Stat. tit. 21 § 1440 defines nighttime in Oklahoma as the period between sunset or sunrise. Under either statute in effect in 1983, the search of the O'Rourke home at 10:00 p.m. was certainly in the nighttime.

looked to common law. While this may be permissible in some instances, it was contrary to Oklahoma law. Third, the district court judge completely ignored forty years of judicial interpretation of the Oklahoma contempt statute and interpreted the Oklahoma statute *de novo*. On all three bases we find error. At all times relevant to this case, contempt was classified as *sui generis* in Oklahoma. This court could find no Oklahoma case defining contempt as a felony and neither did the district court.

III.

The primary issue on appeal is whether the nighttime execution of a daytime bench warrant in a family residence for an offense defined in Oklahoma as *sui generis* violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

The essential inquiry when faced with challenges under the Fourth Amendment is whether the search or seizure was reasonable—reasonableness is analyzed in light of what was reasonable at the time of the Fourth Amendment's adoption. *Carroll v. United States,* 267 U.S. 132, 149 (1925); *Boyd v. United States,* 116 U.S. 616, 622-23 (1886); *United States v. Gibbons,* 607 F.2d 1320, 1326 (10th Cir. 1979); *United States ex rel. Boyance v. Myers,* 398 F.2d 896, 897-98 (3d Cir.1968). It is axiomatic that the Fourth Amendment was adopted as a direct response to the evils of the general warrants in England and the writs of assistance in the Colonies. *Steagald v. United States,* 451 U.S. at 220 (1981); *Payton v. New York,* 445

U.S. at 583-84, n. 26 (1980); *United States v. Chadwick,* 433 U.S. 1, 7-8 (1977); *Stanford v. Texas,* 379 U.S. 476, 481-82, *reh'g denied,* 380 U.S. 926 (1965); *Boyd,* 116 U.S. at 624-30 (1886). Therefore, we look to history for guidance on reasonableness.

A. General Warrants

In 1762, the English government, seeking to censure authors, printers and publishers of seditious and treasonable papers, namely the *North Briton,* issued general arrest warrants authorizing home searches. Pursuant to these "roving commissions," the government, on the scantiest evidence, arrested forty-nine printers in three days, "even taking some from their beds in the middle of the night." The printers brought suit against the government messengers for false imprisonment. Chief Justice Pratt ruled the warrants illegal. The London jury awarded the plaintiffs 300 pounds sterling in damages.[19] In response to defendants' claim of excessive verdict, Pratt admitted that 20 pounds sterling would have been sufficient for six hours of imprisonment; however, he found that:

> [T]he small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light which the great point of the law touching the liberty of the subject appeared to them at the trial;

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[19] *Huckle v. Money,* 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763). Cited in N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937), at 44.

> they saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting on the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavor to support and maintain the legality of the warrant in tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.[20]

In one case, a printer received a verdict for 400 pounds sterling. The government appealed to the King's Bench, which affirmed the decision and held that *"[i]t is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give directions to the officer."* (Emphasis added.)[21]

The English government defended all actions arising from the general warrants—the damages totalled 100,000 pounds sterling. These cases were praised and welcomed in England and "even in faraway America." Wilkes, a member of Parliament and the author of the *North Britton,* was corresponding with leading Americans of the period—James Otis, Samuel Adams, John Hancock, John Adams and Josiah Quincy. N. Lasson, *The History and Development of the Fourth Amendment to the United*

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[20] *Id.* at 45, n. 111.

[21] *Money v. Leach,* 3 Burr. 1692, 1742, 97 Eng. Rep. 1050, 1075 (1765). Cited in N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937), at 47.

States Constitution (1937), at 43-50.

Finally in April of 1776, the House of Commons resolved that the general warrants were illegal. Coming from the floor debates, William Pitt, Earl of Chatham, eloquently conveyed the clear message:

> The poorist man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

T. Cooley, 7th ed. (1903), *A Treatise on the Constitutional Limitations* at 425, n. 1 (also quoted in *Payton,* 445 U.S. at 601, n. 54; and *Miller v. United States,* 357 U.S. 301, 307, (1958)).

B. Writs of Assistance in the Colonies

Meanwhile on this side of the Atlantic, the argument centered around the writs of assistance employed by customs officers for discovering smuggled goods. The writs were also general warrants but they were even more abusive, i.e., they were not returnable at all after execution. In essence, they were a continuing license to search a home with practically absolute discretion delegated to the petty officer. N. Lasson, *supra,* at 51-59.

In the *Writs of Assistance Case* of 1761, Boston became the center of the debate. James Otis electrified the audience with his argument against the practice. He pronounced the writs " 'the worst instrument of arbitrary

power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in our English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' " *Boyd,* 116 U.S. at 625. Accord *Stanford v. Texas,* 379 U.S. 476, 481 (1965). Later in recounting the speech, John Adams declared that:

> " 'Mr. Otis's oration . . . breathed into this nation the breath of life.' He 'was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against the Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born . . . . [I]n 1776, he grew to manhood and declared himself free.' "

N. Lasson, *supra,* at 51-59. Today she is embodied in the Fourth Amendment.

C. Early Aversion to Nighttime Searches

Of special significance to this case on appeal is that despite the unbridled discretion delegated to the petty officer by the general warrants in England, nighttime execution in a home was not authorized. 2 Hale, *Pleas of the Crown,* Stokes & Ingersoll ed. 1847, 113; T. Cooley, *supra,* at 430; *accord United States v. Gibbons,* 607 F.2d at 1326 (1979); *United States ex rel. Boyance v. Myers,* 398 F.2d at 897-98 (1968). Even the Writs of Assistance, more odious and abusive than the general warrants, permitted searches of dwellings only in the daytime. N. Lasson, *supra,* at 54. *Accord Gibbons,* at 1326; *Myers* at 897-98. We see this

aversion to nighttime searches of the home codified in two statutes passed by our first Congress: Act of July 31, 1789 § 24, 1 Stat. 43, authorizing the search for goods subject to duty in "dwelling—house, store, building . . . upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the *day time only*). . . ." *Id.* (Emphasis added); and Act of March 3, 1791 § 29, 1 Stat. 206, authorizing the search of distilled spirits "*in the daytime*, upon request, to enter into all and every houses, store-houses, ware-houses. . . ." (Emphasis added.)

In the words of Justice Frankfurter, "[s]earches of the dwelling house were the special object of this universal condemnation of official intrusion. Night-time search was the evil in its most obnoxious form." *Monroe v. Pape,* 365 U.S. 167, 210 (1961).[22]

D. Contemporary Law

Aside from history, we do not write on a clean slate on this issue. Looking toward more contemporary analysis of nighttime searches, we find clear support for the unreasonableness of this nighttime search. In *United States v. Merritt,* 293 F.2d 742 (3d Cir. 1961), the Third Circuit held that where a warrant provided for execution in the daytime, but was executed in the nighttime, it was legally invalid. As such, the police officers' entry into the defendants' apartment was on the same plane as an entry without

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[22] Overruled solely on the issue of municipal liability under 42 U.S.C. § 1983. *Monnell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 664-89 (1977).

a warrant and, therefore, a violation of the Fourth Amendment. *Id.* at 746. In *United States ex rel. Boyance v. Byers,* 398 F.2d 896 (3d Cir. 1968), the Third Circuit, pursuant to a writ of habeas corpus, held that a warrant expressly limited to daytime searches, executed in a private home in the nighttime was "constitutionally invalid." Id. at 899. It held the search unreasonable based on the common law aversion to nighttime searches, early Congressional statutes authorizing only daytime searches, similar limitations imposed under state statutes, and the directive in Fed. R. Crim. P. 41(c). *Id.* at 888-89. In *Dorman v. United States,* 435 F.2d at 385 (1970), the United States Court of Appeals for the District of Columbia Circuit, *en banc,* held that nighttime entry of a home to effect an arrest necessarily implicates "reasonableness" under the Fourth Amendment and "may elevate the degree of probable cause . . . both as implicating the suspect, and as showing that he was in the place entered. . . ." *Id.* at 393. In *United States v. Smith,* 340 F.Supp. 1023 (D. Conn. 1972), the District Court of Connecticut held that to justify the nighttime execution of a state daytime warrant in an occupied family home, there must be *shown to a magistrate* a greater proof that the property to be seized is on the premises than is necessary for a daytime search. "[T]he fact that a private dwelling is entered at night has constitutional significance." *Id.* at 1029 (citing *Myers,* 398 F.2d at 897-98, and *Jones v. United States,* 357 U.S. at 498). The court held that the nighttime search did not meet the reasonableness requirement of the Fourth Amendment. *Id.* at 1029 In *United States v. Gibbons,* 607 F.2d at

1320, this circuit, presented with the reasonableness of a nighttime search of a *car* trunk pursuant to a state daytime warrant, held that the "factor of a nighttime search is senstively related to the reasonableness issue" in the Fourth Amendment. *Id.* at 1326. Its determination was based on the common law aversion to nighttime searches prior to the adoption of the Fourth Amendment. *Id.* Holding the nighttime search of a car trunk to be reasonable, this circuit qualified its holding by explaining that the: (1) "search involved no intrusion into a home"; (2) the search of a car does not present a strong case for claiming unreasonableness for a nighttime search; and (3) the facts presented the "necessity of immediate police action." *Id.* at 1327.

To determine that a warrant limited to daytime execution authorizes the nighttime search of a home is to completely eviscerate the issuing magistrate's determination of reasonableness.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government endorcement agent. (Footnote omitted.)

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

It was the absence of the neutral and detached magistrate which led to the abuses in England and the Colonies. It is the absence of the neutral and detached magistrate's determination of the reasonableness of the nighttime search of the O'Rourke home which renders it unreasonable under the Fourth Amendment.

IV. RECUSAL

We are being asked in the first instance to exercise our inherent power in the administration of appeals and remands to reassign this case in the event of retrial or remand. Ordinarily 28 U.S.C. § 144 and § 455 are invoked at the district court level to effectuate recusal. However, these statutory provisions are not the exclusive route for disqualification. The appellate court's authority to reassign exists apart from the judicial disqualification statutes. *Offutt v. United States,* 348 U.S. 11, 16-18 (1954); *Cooke v. United States,* 267 U.S. 517, 539 (1925); *United States v. Sears, Roebuck & Co.,* 785 F.2d 777, 780 (9th Cir.), *cert. denied,* 479 U.S. 988 (1986); *Verniero v. Air Force Academy Sch. Dist. No. 20,* 705 F.2d 388, 395 (lOth Cir. 1983) (McKay, J., dissenting); *United States v. Ritter,* 273 F.2d 30, 32 (l0th Cir. 1959), *cert. denied,* 362 U.S. 950 (1960); *United States v. Hatahley,* 257 F.2d 920, 926 (l0th Cir.), *cert. denied,* 358 U.S. 899 (1958). However, absent proof of personal bias, we remand to a new judge only under extreme circumstances.

In *Sears,* the Ninth Circuit held that "reassignment is admissible to preserve the appearance of justice." *Id.,* 785

F.2d at 780; *accord United States v. Arnett,* 628 F.2d 1162, 1165 (9th Cir. 1979); *United States v. Robin,* 553 F.2d 8, 10 (2d Cir. 1977) (*en banc*). While the "appearance of justice" basis for reassignment seems persuasive in the context of 42 U.S.C. § 1983, we hesitate to formally order reassignment. Instead, we remand to the district court for its own consideration of whether recusal is warranted. In the remand, we are mindful that the function of the district court is to determine the attorney's fees to be allowed to the O'Rourkes under 42 U.S.C. § 1988. The district judge who decided this case is familiar with the amount of effort put into the trial by the attorney for the O'Rourkes. We believe this effort can be recognized by the district judge and will be fairly assessed. such an assessment to be subject to our review, should any of the parties feel aggrieved by such a determination.

CONCLUSION

Considering the common-law origins of the aversion to nighttime searches, the abuses present in the minds of the Framers, the protection historically afforded the sanctity of the home, and the cases cited above, we hold that the search of the O'Rourke home at 10:00 p.m. without a nighttime endorsement on the warrant was unreasonable under the Fourth Amendment. As such, we REVERSE the district court on that issue. On the issue of municipal liability, we hold the City of Norman liable. We find it unnecessary to undergo analysis on the issue of municipal liability since the order and stipulation entered into and signed by the City of Norman provides that "in the event that the Plaintiffs should prevail upon any issue

. . . , the Defendant shall pay to the Plaintiffs the sum of $4,000.00 heretofore as damages." We find this binding as to the City. In addition, in their briefs both Appellants and Appellees agree that damages are limited to $4,000.00. Appellees argue that the stipulation is not a waiver of the city's defense as to municipal liability. We disagree. The plain language establishes liability upon the plaintiffs' success on any issue. Appellees also argue that the stipulation does not amount to a waiver of the qualified immunity of the individual police officers. Assuming there was a waiver, the police officers are liable; assuming there was not, on the issue of qualified immunity, we find that the law was clearly established to satisfy the standard set forth in *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987). Therefore, we hold Police Officers Winter and McKenzie liable—they should have known that the nighttime execution of a daytime warrant in a family residence was unreasonable under the Fourth Amendment. In addition, we hold Lt. Cain liable under § 1983. As supervisor in a position of responsibility, he knew or should have known of the misconduct, and failed to prevent the violation of the Fourth Amendment rights of the plaintiffs. *McClelland v. Facteau,* 610 F.2d 693, 696-67 (10th Cir. 1979). We therefore order the district court to enter judgment in favor of the plaintiffs in the total amount of $4,000 and against the defendants jointly and severally.

In view of our decision, we must also vacate the imposition of sanctions against the plaintiffs and their counsel. The suit was not frivolous.

Based on the circumstances giving rise to the Fourth Amendment, we conclude that a police officer does not have unbridled authority under a warrant—it is for an impartial judge to decide what is reasonable. *A fortiori* it is for an impartial judge to decide the reasonableness of a nighttime search in a home. The case here does not present consent, hot pursuit or exigent circumstances. The police officers' nighttime execution of a daytime warrant in the O'Rourke home for an offense defined as *sui generis* was like "burning a barn to roast an egg,"[23] and we so hold.

We REVERSE on the constitutionality of the search and REMAND on the issue of attorney's fees and costs pursuant to 42 U.S.C. § 1988. We direct the district court to enter judgment in favor of the plaintiffs, jointly and severally, against each of the defendants, together with interest in an appropriate amount to be computed by the district court, such interest to run from and after the date of the stipulation referred to in this opinion.

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[23] N. Lasson, *supra,* at 68, n. 60 (referring to the whole customs systems and the writs of assistance).

APPENDIX B

Case No. CIV-85-10-B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL W. O'ROURKE, et al,
Plaintiffs,

v.

THE CITY OF NORMAN, et al,
Defendants.

OFFICIAL COURT REPORTER'S TRANSCRIPT OF THE RULING OF THE COURT HELD ON THE 27TH DAY OF MAY, 1986 BEFORE THE HONORABLE LUTHER BOHANON, IN OKLAHOMA CITY, OKLAHOMA.

APPEARANCES

For the Plaintiffs:	Mr. Michael Salem Attorney at Law 101 East Gray Norman, Oklahoma 73069
For the Defendants:	Mr. Burton J. Johnson Attorney at Law P. O. Box 486 Oklahoma City, Oklahoma 73101
	Ms. Pat Herron Assistant City Attorney P. O. Box 370 Norman, Oklahoma 73069
Reported By:	Mary E. (Liz) Waggoner, CSR Official Court Reporter 3315 U.S. Courthouse Oklahoma City, Oklahoma 73102 (405) 232-3490

RULING OF THE COURT

THE COURT: Well, first, I'd like to thank both of your lawyers for your efforts in bringing to the court the evidence in this case.

In a case of this kind, of course, the court has got to sum up all of the evidence and decide where the truth is.

The truth in this case and in all cases has great weight as to what the court should do with reference to ordering a judgment of the court.

The court has paid very close attention to all of the witnesses testifying in this case.

I never remember sitting in the courtroom when I was so close to the witness and could hear everything the witness had to say and see and read the expression on their faces as to what they were saying was what they knew to be the truth.

From all of the evidence in this case, the court has concluded that the credibility of all of the defendants witnesses far, far outweighs the credibility of the plaintiffs witnesses.

I think with this kind of a finding of fact and conclusion, the court does hold and finds that the defendants and each of them are entitled to judgment in their favor against the plaintiffs.

The court likewise holds and finds that the Norman Police Officers, both McKenzie and Winters, were properly trained in their duties as officers for the City of Norman.

The court holds and finds that these two officers, McKenzie and Winters, did in good faith and in the best interest and the highest of sincerity have and had probable cause under all of the circumstances that I have heard to search the house at 2602 Chateau, Norman, Oklahoma.

The evidence shows that Deborah lived there.

The court believes that the officers say she lived there, that O'Rourke said she lived there and she did live there. And Deborah O'Rourke did tell the officers that she lived there.

She lived there. Her son lived there. And all of the evidence that I have heard makes the court feel very, very sorry for Deborah.

She's a little girl. She got married quite young and the marriage didn't stick. She got a divorce. She's unable to hold a job permanently apparently. She's had a lot of physical problems.

Her parents have shouldered their responsibilities in taking care of her baby boy who is now six years old or thereabouts.

And I do feel sorry for her. And I think that she though violated their instructions that she must not use 2602 Chateau Street as her residence or her home.

They had told her that. But, she continued to use it.

Why?

Because she filled out applications for jobs. There's no other telephone where they can tell her, you have a job; you don't have a job; you can come to work.

There's no other place that she knew of to make the proper contact in her search for jobs.

So, she gave the telephone number. She put it on the checks she wrote. She gave it to everybody apparently that she contacted for jobs, locally at least.

And there's no question but what she lived there.

And to me, the bench warrant, when it's given to an officer and it includes a Policeman, an order to go and arrest Deborah Boyd because she's been found in contempt of court, if the court orders are not carried out, then we soon live in anarchy.

The order of the court, this is from a legitimate legal institution, the Court of Cleveland County, State of Oklahoma, to go and arrest and bring her to court.

It's a command without qualification. Without limitation of anykind so far as I can see.

It's not a misdemeanor warrant nor is it a felony warrant.

It's a bench warrant. An order of the court.

And when people fail to respect the court orders and when officers are paid to carry out court orders, then we have the beginning of an anarchy.

Because of the lack of credibility on the part of the plaintiffs witnesses, the court holds and finds that this lawsuit was brought in bad faith and the plaintiffs brought this lawsuit hoping that they could discover something that would sustain their claim.

It's in such bad faith, depending upon a tremendous

amount, and I say to you, Mr. Salem, I have never experienced in all my life on the bench, where the Federal Discovery Rules were so abused by you in this court.

You had no real proof of a lawsuit when you filed it.

And your hope and prayer was that by vigorous discovery problems, you could find something.

That the training of the officers, the abuse of the officers, the operations of the City Police Department, was so rotten that you could make out a lawsuit.

And for this reason, the court is going to hold and find that the defendants are entitled to an attorney fee, charged against the plaintiffs in this case.

And in this connection, I'll tell you, Mr. Johnson, you file, if you want to; I'm not saying you've got to, but if you want to, file your attorney fees and costs in this case.

You'll do so within ten days and the court will have a hearing and in due time, the court will prepare the file its findings of facts and conclusions of law and the costs of attorney fees that the City has been out.

The City has been out a lot of time and work and for it all, trying to satisfy the plaintiffs counsel.

And the court has extended to plaintiffs counsel a helping hand because of the allegations of violations of the Constitution of the United States.

I'm a great, great believer in enforcing the Constitution of the United States.

And for this reason, the court has caused the City of

Norman to go one mile further or even two miles further to give you, Mr. Salem, documents after documents, records after records. You have worked the City of Norman over good trying to find something to establish a lawsuit that would be one upon which a court could render a judgment.

And in all of this, you have proved nothing. I find that you have proved nothing.

As I said, this bench warrant speaks loud to the court.

When orders are given to officers, particularly in Federal Court and I've given a bench warrant to a Policeman, he's standing here and I say, go arrest so and so and bring them in as a witness. They go do it. There's nothing in writing. They just go do it because it's the system.

The courts are the foundation of law and order. And the officers are expected to carry out the orders. And that's what these officers were doing the night of May 16th, 1983.

Even though it was in the nighttime, they had been there two days before. Everybody knew about that. Everybody that was interested knew of the bench warrant. They knew it was Deborah Boyd that was wanted for court. Even the parents knew it.

And they said, come in in the morning and we'll have her down there. But, come the next morning, she didn't show up. They didn't have here down there.

And I say this to you, Mr. O'Rourke, It's your duty,

when you found out there was a warrant for your daughter, to me, you should have said, look, Deborah, come get in my car, we're going down there. And we're going to answer this warrant. And you take her down there and say, here she is. And if she needed your help, of course, as a father, you give her such help as she needed.

You answered that you have known of these problems. You knew that the officers were looking for her and the officers are not prone to pass it up. It's their duty and if they are well trained, they won't.

And the court finds these officers were well trained and they did do what they were ordered to do and that was to make the search they made.

They were courteous by the plaintiffs own witnesses. They were polite. They didn't abuse anyone. They were excellent officers in my judgment.

Under the circumstances, Deborah was a fugitive. She was known to be a fugitive, running here, running there and avoided this warrant. It has a date of February 2nd, 1983. She's down in Lawton some. She's here.

The Police Department and the Sheriff's Department are all short handed and they have what? Thirty five hundred warrants unserved.

And they get some information and they get some data and the court is very impressed with the testimony of Robillard.

She told the truth.

She was helping her daughter collect money she

loaned, according to her records, to Ms. Boyd. She hadn't paid her.

And I don't think there's any questions but that Mr. O'Rourke told her over his dead body would she ever be paid.

And this is bad, I think. Very bad.

Mr. Johnson, do you plan on filing a statement of costs and attorneys fees?

MR. JOHNSON: Yes, your Honor. I think under the circumstances, the City and I will have to sit down and will be compelled to file attorney fees.

THE COURT: Can you do it within ten days?

MR. JOHNSON: Yes, sir.

THE COURT: File it in ten days and the court will set it down for hearing to fix the amount that the court will allow as a judgment against the plaintiffs in this case.

And along the way, the court will work on this, just a short resume of the findings of this case.

There's a lot more findings that the court will address. What I have done is just hit the highlights. But, there will be more findings of facts and conclusions of law which the court will be prepared to file and after we have the hearing, the court will file the findings of fact and conclusions of law.

And then, the time for an appeal will not begin to run until the court has filed a written findings of facts and conclusions of law.

I want to say further, that the expert, Noah Goddard who came here from Tecumseh, Kansas and testified as a plaintiff's expert witness and Dr. Chapman testified as the defendant's expert witness and from Dr. Chapman's examination and cross examination of Mr. Goddard, to me, you completely destroyed his testimony. It wasn't worth a nickel. Mr. Goddard's testimony absolutely was void of any credibility at all.

On the other hand, Chapman has been an instructor and he's done much with the City of Norman and he's capable and he's trained and has trained and continues to train the Norman City Police Officers and he's to be commended for his work as such.

Now, does anyone have any questions to ask the court before we recess.

All right. Court's in recess.

(THEREUPON, The Proceedings were concluded.)

CERTIFICATE

I, Mary E. (Liz) Waggoner, CSR, CP, an Official Court Reporter for the United States District Court for the Western District of Oklahoma, do hereby certify that the above and foregoing transcript, as follows: hearings held on May 14th, May 15th, May 16th, May 27 and May 28th, 1986, was by me taken in shorthand and thereafter transcribed, and that it is accurate and correct, and that the same was taken on the dates as indicated above, and that I

am not an attorney for or relative of either of said parties, or otherwise interested in the events of said action.

In witness whereof, I have hereunto set my hand, this 6th of March, 1987.

s/s Mary E. Waggoner

Mary E. (Liz) Waggoner, CSR, CP
Official Court Reporter
U.S. District Court for the
Western District of Oklahoma.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-85-10-B

FILED
JUN 19 1986
ROBERT D. DENNIS
CLERK, U.S. DISTRICT COURT
S/S Kathaleen A. Buckley
DEPUTY

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE and KATHLEEN O'ROURKE,
Plaintiffs,

v.

THE CITY OF NORMAN, a Municipal Corporation,

KELVIN WINTER and DOUG McKENZIE, individually and in their official capacity as duly authorized law enforcement officers for the City of Norman, and

STEVE CAIN, individually and in his official capacity as police supervisor and a duly authorized law enforcement officer for the City of Norman,
Defendants.

JUDGMENT

Based upon the Findings of Fact and Conclusions of law filed herein this day,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants, the City of Norman, Kelvin

Winter, Doug McKenzie, and Steve Cain, have judgment against the plaintiffs, Michael W. O'Rourke, Shirley M. O'Rourke and Kathleen O'Rourke on all claims advanced by the plaintiff's complaint. The time for appeal from this judgment is stayed until the scheduled hearing on attorney fees is concluded and the court has made its final ruling on that question as well.

Dated this 19th day of June, 1986.

S/S Luther Bohanan

United States District Judge

ENTERED IN JUDGMENT DOCKET ON JUNE 19, 1986

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-85-10-B

FILED
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ROBERT D. DENNIS
CLERK, U.S. DISTRICT COURT
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MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE and KATHLEEN O'ROURKE,
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THE CITY OF NORMAN, a Municipal Corporation,

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STEVE CAIN, individually and in his official capacity as police supervisor and a duly authorized law enforcement officer for the City of Norman,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before this court on May 13, 1986, through May 29, 1986, and the court, having fully reviewed the exhibits, the testimony of the witnesses and the arguments presented by the parties plaintiff and defendant, now finds and concludes as follows:

FINDINGS OF FACT

1. Deborah Boyd is the daughter of the plaintiffs Michael W. O'Rourke and Shirley M. O'Rourke and the sister of the plaintiff Kathleen O'Rourke.

2. On the dates in question in this case, May 14, 1983, through May 16,1983, there was an outstanding bench warrant for the arrest of Deborah Boyd for contempt of court issued by the district court of Cleveland County, Oklahoma. The warrant arose out of the failure of Deborah Boyd to pay a judgment rendered against her in favor of one Claire J. Robillard, and Boyd's subsequent failure to obey an order to appear and show cause why she should not be found in contempt of court.

3. On May 14, 1983, at approximately 3:00 p.m. Officer R. J. Cook of the Norman Police Department, accompanied by Officer L. D. Moore, received a radio call from the police dispatcher to proceed to the Safeway Store at the corner of Southwest 24th Street and West Main in Norman, Oklahoma, and there contact a woman who had called the dispatcher to report that Ms. Boyd was in the Safeway Store and that there was a warrant for her arrest. The officers were met at the store by Linda Robillard, mother of Claire Robillard, who told them that Boyd had left the store. Robillard then gave the officers a description of the vehicle Boyd was in and also an address where she believed Boyd lived. The officers proceeded to the address, followed by Robillard who was not certain of the exact address but was familiar with the house. The address given to the officers was incorrect, but Robillard was able

to point to the correct house: the O'Rourke residence at 2602 Chateau Drive. The vehicle described by Robillard as being used by Boyd was not in the driveway nor was it in the garage of that house, and it appeared to the officers from an external examination of the house that nobody was at home. Officer Moore knocked on the door and rang the doorbell but received no answer. The officers decided that Boyd was not there, but before leaving the scene they told Robillard to contact the police department if she located Boyd again.

4. At the time Officers Cook and Moore visited the O'Rourke house on May 14, Michael O'Rourke was in fact inside the house, accompanied by his son Wesley and witnessed the actions of the officers and Mrs. Robillard.

5. Michael O'Rourke recognized Robillard when she drove up in front of his house with the officers on May 14 and knew from numerous telephone calls made to the O'Rourke residence by both Linda and Claire Robillard that they were attempting to obtain satisfaction of the judgment against Deborah Boyd. Mr. O'Rourke had once told Linda Robillard that the judgment would be satisfied over his dead body.

6. Wesley O'Rourke, on February 11, 1983, received service at the 2602 Chateau address, on behalf of Deborah Boyd his sister, of the citation of contempt in the Robillard case which resulted in issuance of the subject bench warrant for Boyd's arrest when she did not appear and show cause as ordered by the citation.

7. On May 16, 1983, at approximately 9:30 p.m.,

Linda Robillard called the Norman Police Department to report that Deborah Boyd was at the 2602 Chateau residence. The telephone call was a conference call with Robillard's daughter Claire patched in from a third location. Linda Robillard briefly recounted the events of the previous Sunday, May 14, to the police PBX operator and explained that there was a warrant for the arrest of Deborah Boyd. Linda Robillard was not herself certain that Boyd was at 2602 Chateau at that moment. Claire, however, stated that her source, an unidentified male, was definite that Boyd was there at that time. The PBX operator called the Cleveland County Sheriff's office while the Robillards were still on the line and confirmed that there was a bench warrant for Deborah Boyd and that the address given on the warrant was 2602 Chateau. The PBX operator also determined that the case number on the warrant was SC-82-1952 and that bail was set at $500.

8. After concluding the conversation with Robillard, the PBX operator contacted Officer Kelvin Winter, one of the defendants in this action, told him that there was a bench warrant for him to serve and informed him of the charge, the name of the defendant, the residence of the defendant, the case number and the amount of bail. Winter was also told that an identified person had called to report that Boyd was at the 2602 Chateau residence. At Winter's request, Officer Douglas McKenzie, also a defendant in the present action, agreed to accompany Winter to attempt to serve the warrant.

9. Officers Winter and McKenzie arrived at 2602 Chateau at approximately 10:00 p.m. From the outside,

they could see that several lights were on in the house and they heard the telephone ring, saw Mr. O'Rourke answer it and saw other people moving around inside the residence. They knocked on the front door and were greeted by a "white juvenile female," Kathleen O'Rourke. (For reasons unknown, at the trial of this action all three plaintiffs testified that the door was initially answered by the mother, Shirley O'Rourke, and not by Kathleen. The court, however, having had an opportunity to observe the countenances of all the witnesses as they testified, and the various inconsistencies of their testimony, is very unfavorably impressed with the credibility of the O'Rourke family and sees no reason to accept any portion of their story that may conflict with the account given by the defendant officers whose testimony was forthright and candid.) The officers asked Kathleen whether she was Deborah Boyd, and she said no, that Deborah was her sister and was not at home right then. She then went to get her parents. At trial, the officers testified that Kathleen hesitated and displayed some uncertainty or nervousness while talking with them.

Michael O'Rourke came to the door and told the officers that Deborah Boyd was not at home right then though she did live there, had been present earlier, and would return later. He offered to tell Boyd the officers were looking for her the following morning. Officer McKenzie asked O'Rourke if he knew where Boyd was, and O'Rourke answered that she was at work. When asked where Boyd worked, O'Rourke refused to give that information to the officers. McKenzie then advised

O'Rourke that it was not wise for him to withhold information concerning Boyd's whereabouts and that he could be arrested if he obstructed the officers. O'Rourke then asserted that he didn't know where Boyd worked. While this conversation was going on, the officers noticed that other people inside the house were peeking around corners at them.

Officer McKenzie then, out of courtesy, asked O'Rourke for permission to search the residence for Boyd, but when permission was refused told him that the officers had a right to make the search whether or not permission was given because they had probable cause to believe Boyd was there. O'Rourke said that he thought he was within his rights to refuse to give the officers permission for the search and asked them if he could call his lawyer and the police department about the matter. O'Rourke invited the officers to come into the house to have a seat while he used the telephone. The officers agreed and followed O'Rourke into the kitchen and dining room area of the house but remained standing during O'Rourke's calls.

O'Rourke was unable to contact his lawyer but did reach and talk with the officers' supervisor, Lt. Steve W. Cain, also a defendant in this action, at the Norman Police Department. Cain already knew that officers McKenzie and Winter were attempting to serve an arrest warrant at 2602 Chateau. O'Rourke described the events that had occurred since the officers had arrived at the house, and then asked Cain if the officers were correct in stating that they had a right to search the house for Boyd. Cain told O'Rourke that if the officers had a warrant for Boyd's ar-

rest and probable cause to believe that she might be in the residence, they did not need a search warrant and did have a right to enter the residence and search for Boyd. O'Rourke then questioned Cain about what was meant by probable cause. While trying to explain the matter to O'Rourke, Cain asked if the officers were where he, Cain, could talk to them. O'Rourke answered "No" though the officers were at that time standing in the same room with him. The conversation concluded with O'Rourke telling Cain that he wanted him to understand that the officers did not have permission to search the residence. Cain immediately thereafter attempted to reach officers McKenzie and Winter by radio but was unable because the officers had turned the volume down on their walkie-talkies in order to minimize any disturbance to the occupants of the house.

After his conversation with Cain, O'Rourke called his wife and daughter into the room where the officers were and had them witness while he stated to the officers that he would not physically resist a search but that he was expressly not granting them permission to search the house. The officers indicated that they understood his position and then asked O'Rourke to acknowledge that they had been courteous, which he did.

The officers then searched the residence without finding Deborah Boyd. At the time the officers were in the house, all of the family members in the house were fully dressed except for Deborah Boyd's two year old son who was asleep in a bedroom. The officer who searched that room was careful not to disturb the child.

After giving Mr. O'Rourke their names and badge numbers, at his request, the officers left the house.

10. Approximately 20 minutes after officers Winter and McKenzie left 2602 Chateau, Mr. O'Rourke went to the police station and spoke again with Lt. Cain about the incident. Cain answered O'Rourke's questions as well as he could but had not yet had an opportunity to speak with McKenzie and Winter. He explained to O'Rourke the procedure for filing a formal complaint. O'Rourke obtained a blank complaint which he filled out and filed later that night. A few days later, O'Rourke also filed an addendum to the complaint. In neither the original complaint nor the addendum did O'Rourke assert that his house was not the residence of Deborah Boyd or that he had told the officers McKenzie and Winter as much. O'Rourke claimed only that he told the officers Boyd was not in the house at the time. In his addendum, O'Rourke admitted that he had refused to answer one line of questions put to him by the officers, though the addendum went on to assert that O'Rourke "really had no answer at that time." The addendum also for the first time asserted that "in failing to counsel with these officers, Lt. Cain contributed heavily [sic] to the sequence of events which occurred in this complaint."

11. On May 14 and 16, 1983, 2602 Chateau, Norman, Oklahoma, was Deborah Boyd's residence. This finding is based upon the evidence of Boyd's frequent and continued use of that address for purposes of employment applications, legal matters and documents, and upon the statements made by Kathleen and Michael O'Rourke to of-

ficers Winter and McKenzie the night of May 16, 1983, the testimony of Linda Robillard at the trial of this matter, the fact that Boyd has never established any other address or residence having a lasting or permanent character, and the fact, uncontested by plaintiffs, that Deborah Boyd's son, who was entrusted to her custody by court order, was clearly living at the 2602 Chateau address.

12. Plaintiffs in the original complaint in this action asserted that during his telephone conversation with Lt. Cain the night of May 16, 1983, "Plaintiff MICHAEL O'ROURKE . . . requested Defendant CAIN to instruct the officers not to search the premises without a search warrant as required by law and defendant CAIN refused." This statement is false inasmuch as Michael O'Rourke in fact prevented Cain from talking with the officers by deliberately misleading Cain about whether the officers were available to speak with him on the telephone. Furthermore, plaintiffs knew this statement to be false at the time they filed their complaint.

In the final pretrial order filed herein May 5, 1986, and bearing plaintiff counsel's signature, it is alleged by plaintiffs that

> Steve Cain, a supervisory police officer of the City of Norman, had the opportunity to prevent the search intrusion into the O'Rourke household . . . immediately prior to the search when Plaintiff Michael O'Rourke phoned defendant Cain to request Cain's assistance in resisting the search, but . . . defendant Cain failed to take any action to prevent the search . . . .

This allegation is, again, false. Cain did not have any opportunity to prevent the search at the time of his phone conversation with O'Rourke, even had he been disposed to do so, because O'Rourke deliberately prevented Cain from talking with the officers by deceiving Cain about the officers' location. The plaintiffs knew this allegation to be false at the time they agreed to the final pretrial order.

13. In their original complaint in this action, plaintiffs asserted that the defendant City of Norman and the individual police officer defendants "and other similarly negligently screened, trained and supervised police officers have and will continue to conduct equivalent illegal searches and seizures against other citizens similar to or identical to [sic] the unconstitutional and illegal search committed against the Plaintiffs . . . ." At no time throughout the pretrial or trial proceedings in this case did plaintiffs present to the court any evidence whatsoever of similar searches or circumstances having occurred at any time in the City of Norman.

14. In their portion of the final pretrial order, the plaintiffs repeatedly assert that Deborah Boyd did not reside at the 2602 Chateau house the night of the search here in question. They also assert that "[a]t numerous times, [Michael O'Rourke] insisted that she did not live there" to officers Winter and McKenzie that night. These statements are false. The court has found that 2602 Chateau was in fact Deborah Boyd's legal and actual residence at the time in question and has further found, upon the evidence and testimony before it, that O'Rourke never told the officers his house was not Boyd's residence

that night; rather, he specifically acknowledged to them that she did live in that house.

Like Michael O'Rourke's complaint with the Norman Police Department, the plaintiffs' original complaint in the present proceedings did not allege either that 2602 Chateau was not Deborah Boyd's residence or that O'Rourke had told Officers Winter and McKenzie as much on the night in question.

15. The law enforcement training actually received by the individual defendants in this case, and all other Norman police officers, greatly exceeds all statutory requirements and is more than adequate to inform them of relevant case law.

16. Plaintiffs have wholly failed to produce even a scintilla of evidence that the City of Norman has been negligent in the hiring, training or supervising of its police officers.

17. Plaintiffs have not produced any evidence that would justify injunctive relief against the defendant officers and City of Norman.

18. Plaintiffs have not produced any evidence that would compel or justify certification of this cause as a class action.

19. The plaintiffs brought this action in bad faith, with a purpose to harass the officers of the Norman Police Department in the lawful performance of their duties and to penalize Linda Robillard, originally named as a defendant but subsequently dismissed, for using lawful means to aid her daughter Claire in securing her lawful rights. The

court finds upon the record and the evidence in the case that after filing their suit the plaintiffs conjured the fiction that 2602 Chateau, Norman, Oklahoma, was not the legal and actual residence of Deborah Boyd on the night in question and purposed to willfully make false statements to the court about what occurred and was said at their house in a wholly deceitful attempt to bring their claim within the more stringent standards laid down by the Supreme Court for searches of third-party residences. *See e.s. Steagald v. United States,* 451 U.S. 204, (1981).

CONCLUSIONS OF LAW

1. It is a serious matter whenever law enforcement officers intrude upon the privacy of a home in order to conduct any kind of search. Officers should always bear uppermost in their minds that they are constrained to act within the limits established by the Constitution of the United States and that individuals have a right to refuse officers entry into their houses to conduct unreasonable searches. By the same token, however, the Constitution presents no bar to the search of a residence where such search is reasonable upon all the relevant facts and circumstances or supported by a duly issued warrant. U.S. Const. amend. IV.

2. The court has previously ruled in this case that the legality of the search challenged by plaintiffs and the validity of the arrest warrant upon which it was premised must be determined by reference to federal constitutional law and not by reference to Oklahoma state law. Order of May 7, 1986, *citing Cooper v. California,* 386 U.S. 58, 61,

(1967); *McNeese v. Board of Education,* 373 U.S. 668, 674 (1963); *Anderson v. Haas,* 341 F.2d 497, 499 (3rd Cir.1965); 42 U.S.C. § 1983 (1982). Though plaintiffs' counsel purported to make an oral motion to reconsider this matter at trial, he offered no persuasive authority whatsoever and the ruling therefore stands as entered.

3. When Officers Winter and McKenzie went to the O'Rourke house at 2602 Chateau, they knew that a warrant for the arrest of Deborah Boyd existed which stated on its face that Boyd's address was 2602 Chateau Drive, Norman, Oklahoma. They also had the benefit of Claire Robillard's statement to the police PBX operator, during the conference call with Linda Robillard, that Deborah Boyd was definitely at 2602 Chateau at that time. The officers were entitled to give substantial weight to this information suppled by an identified informant (Robillard).

In *Easton v. City of Boulder, Colorado,* 776 F.2d 1441 (1985), the Tenth Circuit Court of Appeals summarized the law relating to use of citizen informant evidence specifically with a view toward obtaining an arrest warrant or making a warrantless arrest, but the court's summation is also applicable to probable cause determinations generally:

> . . . when examining informant evidence used to support a claim of probable cause for a warrant, or a warrantless arrest, the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the in-

formant is an identified victim or ordinary citizen witness.

> Courts are much more concerned with veracity when the source of the information is an informant from the criminal milieu rather than an average citizen who has found himself in the position of a crime victim or witness. As noted by Justice Harlan in *United States v. Harris* [403 U.S. 573, 579, 91 S.Ct. 2075, 2079, 29 L.Ed.2d 723 (1971) (dissenting opinion)], "the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis." . . .
>
> 1 W.R. LaFave, *Search and Seizure,* 586-587 (1978); *cf. Jaben v. United States,* 381 U.S. 214, 224, 85 S.Ct. 1365, 1370, 14 L.Ed.2d 345 (1965). This relaxed standard is consistent with the common sense approach taken by the Supreme Court in defining probable cause. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949) *quoted in Illinois v. Gates,* 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983).

Id. at 1449-1450. Robillard's information also was not deprived of value by the fact that it contained elements of hearsay. The Supreme Court

> has long held that "the term 'probable cause' . . .

> means less than evidence which would justify condemnation," *Locke v. United States,* 7 Cranch 339, 348, and that a finding of "probable cause" may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States,* 358 U.S. 307, 311.

United States v. Ventresca, 380 U.S. 102, 107, 85 S.Ct. 741, 745, 13 L.Ed.2d 684 (1965). The information given by the Robillards was also confirmed to some extent by the PBX operator's determination that there did in fact exist a warrant for the arrest of Deborah Boyd and that the address on the warrant was the same as the address given by Claire Robillard when reporting Boyd's current location.

Upon arriving at the house, the officers were able to see from the outside that there were several people inside. The officers were greeted at the door by a teenaged girl, Kathleen, who identified herself as the sister of Deborah Boyd and stated that Boyd was not home right then. Kathleen's answer implied two things: 1) that this was in fact Deborah Boyd's home and 2) that it was mere happenstance that Boyd was not then prsent. Kathleen's nervous manner provided the officers with some reason to be on the alert for the possibility that all was not normal in the household. This, of course, could not constitute probable cause in and of itself but could contribute to the officers' overall assessment of probable cause.

Michael O'Rourke's initial statement to the officers also confirmed that Deborah Boyd was living at the house and further that she had recently been there and would return by the following morning. This information did lit-

tle to undermine the Robillard's statements and in fact served to confirm them somewhat. If the Robillards were wrong about Boyd's immediate location, it was a mistake caused by a fairly recent movement by Boyd. When O'Rourke refused to tell the oficers where Boyd worked, the officers knew 1) that he wanted to withhold information about Boyd's whereabouts, and 2) that he had a hostile attitude toward the police and was inclined to obstruct their efforts to locate Boyd. The court, having had the opportunity to observe Mr. O'Rourke first hand as he testified at trial in this matter, notes that O'Rourke's hostility toward law enforcement personnel is readily apparent, and the court can well understand how the officers could have concluded that O'Rourke was willing to resort to deceit in order to hinder them.

Officer McKenzie also had on previous occasions encountered deceit and hostility in dealing with other members of the O'Rourke family, noteably the son Wesley, in a criminal context. Again, while this by itself would not give the officers probable cause to search the house and might not be legally competent evidence in a criminal trial, it was one more factor which officer McKenzie was entitled to consider when assessing the credability of the O'Rourke statements that Deborah Boyd was not in the house. In sum, the officers had reason to believe that Kathleen and Michael O'Rourke were lying to them and, on the other hand, they had corroborated information from an identified citizen informant indicating that Deborah Boyd was then in the house. The totality of the evidence known by the officers was not indubitable or

necessarily convincing, but it was sufficient to justify a reasonable person in the officers' position in concluding that Deborah Boyd was *probably* in the house. *United States v. Ventresca; Brinegar v. United States,* 338 U.S. 160, (1949). The fact that Boyd was not in fact found in the house subsequently, of course, has no bearing whatsoever on the validity of the officers' assessment of probable cause.

The court, therefore, concludes that officers Winter and McKenzie had probable cause to believe that Deborah Boyd was present at 2602 Chateau Drive while they were there on the evening of May 16, 1983.

The court notes plaintiffs' suggestion that the officers were motivated to search the O'Rourke house because they resented Mr. O'Rourke's assertion of his constitutional rights, and finds that it lacks merit. The court believes upon all the evidence that Officers Winter and McKenzie conducted themselves in an exemplary manner, with utmost courtesy, throughout the relevent [sic] events and that their sole motivation was dedication to duty. It is in any event apparent that O'Rourke did not invoke the Constitution until after the officers had decided they had probable cause and declared their intention to make a search.

4. In *Payton v. New York,* 445 U.S. 573 (1980), the Court held:

> If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to

> the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Id. at 602, 603. Because the *Payton* court referred to the citizen's participation in a *felony* in arriving at its decision, a question may be raised as to whether an arrest warrant pertaining to a lesser offense carries with it the same authority to enter a dwelling lived in by the suspect. The Supreme Court has never specifically addressed this latter point, and it is also unnecessary for this court to express an opinion on the matter in order to resolve the case now before it.

5. Courts have an inherent power to punish contempt. Early in the history of this nation, the United States Supreme Court recognized that "To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute . . .." *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34 (1812). It is significant that at the same time the High Court recognized this inherent power of all courts, it specifically held that circuit courts of the United States could not exercise common-law jurisdiction in criminal cases. Thus, it was long ago recognized that there were essential differences between contempt proceedings and criminal prosecutions. This

distinction was further illuminated in *Myers v. United States,* 264 U.S. 95 (1924) which stated that contempt proceedings "are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions." *Id.* at 103.

Despite this apparent difference in the *source* of authority for contempt and ordinary criminal proceedings, the distinctive character of contempt proceedings has at the same time been blurred somewhat by other decisions. Courts are inclined to refer to contempt proceedings themselves as being either "civil" or "criminal," depending, respectively, on whether the punishment imposed is intended to coerce the defendant into doing what he was supposed to do and is contingent upon his further disobedience, or is designed instead to vindicate the authority of the court and does not terminate upon the defendant's voluntary compliance with a court order. *U.S. v. Hilburn,* 625 F.2d 1177, 1179 (5th Cir. 1980); *Ager v. Jane C. Stormont Hospital & Training, Etc.,* 622 F.2d 496, 499-500 (10th Cir.1980). The Supreme Court has further inclined to treat criminal contempt like any other crime with respect to the constitutional and statutory rights of the accused.

In *Bloom v. Illinois,* 391 U.S. 194 (1968), the Court said "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Id.* at 201, 88 S.Ct. at 1481. The *Bloom* Court also quoted with ap-

proval Justice Holmes' statement that "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers v. United States,* 233 U.S. 604, 610 (1914) (The portion quoted dealt with the applicability of a general criminal statute of limitations.) *quoted in Bloom* at 391 U.S. 201.

Bloom held that criminal contempt must be treated like any other crime insofar as the defendant's constitutional right to jury trial is concerned, and the court indicated that contempts could, like other crimes, be considered either petty or serious, depending on the penalty actually imposed. 391 U.S. at 210-211; *cf.* 18 U.S.C. § 1 (1982). Petty crimes, including petty contempts, "need not be tried to a jury." 391 U.S. at 210; *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); *see also Frank v. United States,* 395 U.S. 147 (1969) (punishment of contempt by a suspended sentence and three years probation did not exceed the penalties authorized for petty offenses and therefore did not require a jury trial.)

Although we are not concerned here with a contempt defendant's right to a jury trial, the High Court's reference to petty and serious offenses in the cases just mentioned sheds some light on an issue of relevance. In *Frank v. United States,* the Court decided that, at least for federal criminal contempt cases, the line between petty and serious contempt would be drawn by reference to the statutory scheme of penalties created by Congress for criminal offenses in general, including particularly 18

U.S.C. § 1. That statute creates three basic categories of offense as follows:

> Notwithstanding any Act of Congress to the contrary:
>
> (l) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

Following this scheme, it is clear that petty contempts should be considered misdemeanors and not felonies. By the same token, it is evident from *Bloom* that not all contempts are petty offenses and, indeed, that some contempts are such serious matters that they may be considered felonies. In *Bloom,* for example, the defendant was sentenced to 24 months imprisonment.[1]

The answer to the question whether contempts may be felonies is even clearer under Oklahoma state law, the law governing the contempt citation against Deborah Boyd in the present case. At the time of the events concerned in the present action the Oklahoma Statute relating to punishment for contempt, 21 O.S. § 566 (1981), stated

---

[1] The sentence in Bloom was imposed by an Illinois state court, and it might therefore be inappropriate to evaluate it strictly by reference to the federal statutes. Nonetheless, the length of sentence is illustrative.

simply "Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court." More than a year after these events, in 1984, the Oklahoma legislature amended § 566 so that it now reads:

> Unless otherwise provided for by law, punishment for direct or indirect contempt shall be by the imposition of a fine in a sum not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding six (6) months, or by both, at the discretion of the court.

It is noteworthy that the legislature by its amendment made three changes in § 566. 1) fines for contempt were limited to $500.00; 2) imprisonments for contempt were limited to 6 months duration; and 3) imprisonments for contempt were restricted to the county jail. Each of these changes indicate the legislature's acknowledgment that the courts of Oklahoma were not previously so limited in the penalties they could impose for contempt. Before 1984 there was no maximum fine or period of imprisonment for contempt, and there was nothing to prevent a court from sentencing a defendant convicted of contempt to a term of imprisonment in the State Prison.

This latter point is significant because the Oklahoma Statutes define a felony as "a crime which is, *or may be,* punishable with death, or by imprisonment in the State Prison." 21 O.S. § 5 (1981) (emphasis added). In *Braly v. Wingard,* 326 P.2d 775, 776 (Okla.1958), the Supreme Court of Oklahoma interpreted this language to mean that "It is not the actual punishment imposed but the extent to

which punishment may be imposed which controls the point whether the crime is a felony . . . ."; *cf. Soetarto v. Immigration and Naturalization Service,* 516 F.2d 778, 781 (7th Cir. 1975) (maximum punishment set by statute determines whether offense is felony or misdemeanor).

It follows logically that during the time period relevant to this case, all contempts were felonies under Oklahoma law, and that when officers Winter and McKenzie searched the residence of Deborah Boyd on May 16, 1983, they were doing so pursuant to a felony warrant for her arrest.

This is provided, of course, that the court had ordered Boyd's arrest for purposes of criminal, and opposed to civil, contempt proceedings. As noted earlier, however, whether the contempt was civil or criminal is a matter determined by reference to the purpose of the punishment actually imposed—a matter uniquely within the discretion of the judge and not ascertainable by police officers, no matter how diligent their efforts, at the time they are seeking to arrest a party named in an arrest warrant.

Similarly, if the seriousness of the offense underlying the warrant must be evaluated without reference to state law, it was impossible for officers Winter, McKenzie and Cain to determine the seriousness of the offense, as well as its civil or criminal character, prior to the arrest. *Bloom* states: "when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the

penalty actually imposed as the best evidence of the seriousness of the offense." 391 U.S. at 211.

It would be patently unfair, and most disruptive to effective law enforcement, to require police officers to second-guess the court commanding them when deciding how to proceed with the service of warrants entrusted to them. It is the conclusion of this court that officers Winter, McKenzie and Cain were entirely justified in treating the warrant involved here as a felony warrant and that there was no amount of training or supervision by the defendant City of Norman that could have improved the performance of these officers in this matter or made it more acceptable under the United States Constitution.

6. Based upon the foregoing findings and conclusions, the court further concludes that the search of Deborah Boyd's residence the night of May 16, 1983, by the defendant officers Kelvin Winter and Doug McKenzie violated no constitutional rights of the plaintiffs Michael W. O'Rourke, Shirley M. O'Rourke and Kathleen O'Rourke and that judgement should therefore be entered in favor of all defendants against the plaintiffs. The court expresses no opinion as to whether a search conducted today under identical circumstances, since the revision of 21 O.S. § 566 by the Oklahoma legislature in 1984, would violate any rights of persons in a position similar to that of the O'Rourkes in this case.

An appropriate judgment will accordingly be entered herein.

Dated this 19th day of June, 1986.

S/S Luther Bohanan

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT OF CLEVELAND COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA

Claire Robillard

vs.

Deborah Boyd

2602 Chateau Drive
Norman, Oklahoma — Defendant

STATE OF OKLAHOMA
CLEVELAND COUN.
FILED
Office Of The Co.
JUN 29 19

No. SC-82-1952

BENCH WARRANT

THE STATE OF OKLAHOMA

To any Sheriff, Patrolman, Marshal or Policeman:

WHEREAS, a Contempt Citation having been set

the 18th day of February 19 83, in the District Court in Cleveland C

State of Oklahoma, charging DEBORAH BOYD

with Contempt of Court. Thereas the defendant did wholly fail to appear.
The Honorable William Clark Hetherington has directed the Court Clerk to issue
a warrant for the arrest of Deborah Boyd.

You are therefore commanded forthwith to arrest Deborah Boyd

and bring her before the District Court of Cleveland County at Norman, Oklahoma, for hearing

, or if the Court has recessed, that you deliver her

into the custody of the Sheriff of Cleveland County, to be detained by said Sheriff until the further order of the C

Or if S he requests it, that you take her before a Magistrate in the County in which you arrest her and

S he may post bail in the amount of $ 500.00 (whether cash, surety or property), to answer said charge.

bond, if posted, shall be immediately forwarded to the Court Clerk of Cleveland County.

BY ORDER OF THE COURT

Given under my hand and the Seal of this Court this

22nd day of February 1983

Norma Nichols
Court Clerk

(SEAL)

By Emma Ruth Jackson
Deputy

EXHIBIT A

BEST AVAILABLE COPY

SHERIFF'S RETURN

I Received this Warrant on the 22nd day of February, 19 83 at o'clock M.
and executed on the 28 day of February, 19 83 at o'clock M., to

IN Custody By

Dated this day of 19

Sheriff of County, Oklahoma

By Under Sheriff Deputy

This 29 day of June 19 83

FEES

To Arrest
To Mileage
To Return
Total 25

Bill Cable Sheriff
H C Bruce Deputy

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
SEP 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-314

In The

Supreme Court of the United States

October Term, 1989

THE CITY OF NORMAN, A MUNICIPAL CORPORATION; AND **KELVIN WINTER** AND **DOUG MCKENZIE**, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS DULY AUTHORIZED LAW ENFORCEMENT OFFICERS FOR THE CITY OF NORMAN; AND **STEVE CAIN**, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE SUPERVISOR AND A DULY AUTHORIZED LAW ENFORCEMENT OFFICER FOR THE CITY OF NORMAN,

Petitioners,

v.

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE, AND **KATHLEEN O'ROURKE,**

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 20, 1989

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Norman, Oklahoma • (405) 321-5453

QUESTIONS PRESENTED

1. Is a bench warrant issued for failure to appear by a small claims court valid under Oklahoma law for service at night?

2. If such a warrant is valid for service at night under Oklahoma law, can a bench warrant issued for failure to appear by a small claims court be used as a basis for a nighttime search of a home incident to that warrant in the absence of exigent circumstances?

3. Can a stipulation that the Defendant City would pay the sum of $4,000.00 in damages for a finding of any civil rights violation still invoke the defense of qualified immunity?

4. If such a stipulation can still invoke the defense of qualified immunity, was the law clearly established that a bench warrant for failure to appear in a small claims case was invalid at night without a night endorsement?

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No. 89-314

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v.

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE, AND **KATHLEEN O'ROURKE,**

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRELIMINARY STATEMENT

MICHAEL W. O'ROURKE, SHIRLEY M. O'ROURKE and KATHLEEN O'ROURKE,

Respondents in this proceeding, oppose the Petition as there is no necessity for further review of this matter. The May 23, 1989 decision of the United States Court of Appeals for the Tenth Circuit is in accord with Oklahoma law regarding warrant validity and well established and settled federal law regarding the Fourth Amendment.

Most importantly, these Petitioners have not suggested a single reason that addresses this Court's sound discretion under *Supreme Court Rule 17.1*. They simply ask this Court to reconsider the Tenth Circuit decision regarding a question of state law, a decision well-ground in Oklahoma law.[1]

They point to no substantial conflicts among the circuits requiring resolution. Since the Tenth Circuit's decision turned on a question of Oklahoma law, there is no "important question of federal law which has not been, but should be, settled by this Court," nor did the

---

[1] Astoundingly enough, the interpretation Petitioners seek calls for a result that invites another violation of the Tenth Amendment. See *O'Rourke v. City of Norman*, 875 F.2d 1465, 1470 (Tenth Cir. 1989) (P. 13, Appendix A, Petition for Writ of Certiorari)(District court ignoring forty years of Oklahoma precedent in determining warrant validity was a violation of the Tenth Amendment). These municipal Defendants apparently do not understand that shortsighted efforts to reinstate the district court ruling (Not following Oklahoma law in determining the nature of contempt) would teeter the carefully crafted balance of federalism if federal courts could disregard state precedent in federal civil rights litigation.

Tenth Circuit render a "federal question in a way in conflict with applicable decisions of this Court."

Finally, they ask this Court to review the Tenth Circuit's interpretation of a stipulation of damages that presented the matter for nonjury trial and which the Circuit construed as a waiver of qualified immunity.[2] Simply put, Petitioners now seek rescue from their own judicially entered stipulation.

In short, there are no "special and important reasons" requiring the exercise of this Court's jurisdiction.

Under the right circumstances (not present here because resolution turned on consideration of state statutes and cases and elementary constitutional law), one question does suggest the essential elements for consideration under *Rule 17.1*. That question is whether a bench warrant or misdemeanor warrant for the arrest of a person can justify a search of a home incident to that warrant. These Defendants, in their Questions I and VI and by their vigorous defense of these officers,

---

[2] This matter was set for jury trial on February 3, 1986. The district court struck the trial date on its own motion. The parties then stipulated to damages in the amount of $4,000.00 which would be paid to the Plaintiffs ". . in the event that Plaintiffs should prevail upon any issue of declaratory or injunctive relief. . " (R/A, Doc. 80, Order dated 2/3/86). The Tenth Circuit ruling this was an illegal, warrantless search triggered the stipulation and it ordered judgment entered in Plaintiffs' favor for the stipulated damages plus accrued interest from the date of the stipulation. *O'Rourke v. City of Norman*, 875 F.2d at 1475-6. (PP. 26-7, Appendix A, Petition for Writ of Certiorari).

concede and commit to the pernicious practice, policy, custom and procedure of nighttime searches of the homes of citizens incident to attempted execution of misdemeanor or bench warrants.

Drawing this to its logical conclusion, in the minds of police officers of the City of Norman, a misdemeanor traffic offense or the "order to appear" swings opens the door to a nighttime "recognizance"[3] through the private and personal chambers of the citizenry's homes.

Although this was the central question sought for determination when Respondents (Plaintiffs) began this litigation, the Tenth Circuit ruling that this incident was a warrantless search barred further consideration. It is an inquiry whose resolution is left to another day.

However, in the event of an acceptance of certiorari and a modification or discarding of the Tenth Circuit judgment that warrant invalidity under state law rendered the search illegal, Respondents urge this Court to affirm the decision upon the theory that a bench warrant can

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[3] At trial, Defendants presented Samuel Chapman, Professor of Political Science at the University of Oklahoma and instructor at the Norman Police Academy, who characterized the officers' actions as "performed within the context of accepted police practice." The Tenth Circuit commented, "Chapman went on to testify that the search of all of the O'Rourkes' home was not a search at all—it was merely a 'recognizance.' This is contrary to all Fourth Amendment law known to this Circuit." *O'Rourke v. City of Norman*, 875 F.2d at 1468 (PP. 7-8, Appendix A, Petition for Writ of Certiorari).

not be used as the basis for a nighttime search of a home absent exigent circumstances.[4]

Another alternative disposition would be a summary affirmance of the decision of the Tenth Circuit as a proper statement of both Fourth Amendment law and the federalism implicit under the Tenth Amendment.

OPINION BELOW

The opinion of the United States Court of Appeals is reported as *O'Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir. 1989). It also appears in the Petition for Writ of Certiorari as Appendix A. It reversed in toto the judgment of the United States District Court, Western District of Oklahoma, reported as *O'Rourke v. City of Norman*, 640 F. Supp. 1451 (W.D. Okla. 1986). The district court decision appears in the Petition for Writ of Certiorari as Appendix B (pp. 11-37).

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[4] Defendant Kelvin Winter testified there were no exigent circumstances that night and the matter was routine. (Tr. 5/16/86, (Holmes), p. 95; p. 104-5). Don Holyfield, Chief of Police, and Darian DeBolt, Patrol Supervisor, testified there were no exigent circumstances. (Tr. 5/27/86, p. 35; Tr. 5/27/86, p. 129). The Tenth Circuit determined the case did not present any issues of "consent, hot pursuit or exigent circumstances." *O'Rourke v. City of Norman*, 875 F.2d at 1476 (10th Cir. 1989) (P. 28, Appendix A, Petition for Writ of Certiorari).

JURISDICTION

The judgment of the Tenth Circuit was entered May 23, 1989. No petition for rehearing was filed.

Petitioners invoked this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) involving review "By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."[5]

QUESTIONS PRESENTED

1. Is a bench warrant issued for failure to appear by a small claims court valid under Oklahoma law for service at night?
2. If such a warrant is valid for service at night under Oklahoma law, can a bench warrant issued for failure to appear by a small claims court be used as a basis for a nighttime search of a home incident to that warrant in the absence of exigent circumstances?
3. Can a stipulation that the Defendant City would pay the sum of $4,000.00 in damages for a finding of any

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[5] Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. §1343(3) based on the existence of a substantial federal question occasioned by a claim of a federal cause of action under 42 U.S.C. §1983 for violation of civil rights under the Fourth and Fourteenth Amendments.

civil rights violation still invoke the defense of qualified immunity?

4. If such a stipulation can still invoke the defense of qualified immunity, was the law clearly established that a bench warrant for failure to appear in a small claims case was invalid at night without a night endorsement?

STATUTORY PROVISION

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

STATEMENT OF THE CASE

Respondents (Plaintiffs) were the subject of a nonconsensual nighttime search of their residence by Petitioner (Defendant) officers of the Norman Police Department.[6] The officers were attempting to execute a bench warrant issued for the arrest of Respondents' daughter, Deborah Boyd, arising out of a failure to appear in a small claims case.[7] Boyd was not found during the search of the O'Rourke home by the officers because she was not there.[8]

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[6] Respondents do not agree that the statement of facts presented by Petitioners is a "concise statement of the facts material to the consideration of the questions presented." *Supreme Court Rule 21(g)*. It is especially not useful because it stresses particular nonrelevant matters (*i.e.*, emphasis on the term "FORTHWITH") and fails to directly state other matters in a straightforward manner (*i.e.*, it never records that the Tenth Circuit held the nighttime search of the home was a warrantless search since the bench warrant was invalid for service at night). The factual recitations of the opinion of the Tenth Circuit in Appendix A of the Petition for Writ of Certiorari and additional facts as may be supplemented by this Respondents' Brief will suffice to sum up the factual predicates needed for this case.

[7] The small claims court had ordered Ms. Boyd to make periodic payments toward satisfaction of a judgment granted against her. When she failed to do so, the adverse party sought Ms. Boyd's punishment by contempt of court for failure to comply with the court order to pay.

[8] A substantial controversy arose as to whether or not

(continued...)

REASONS FOR DENIAL OF THE WRIT

In summary, Petitioners claim the Tenth Circuit erred in ruling that *Payton v. New York*, 445 U.S. 573 (1980) applies only to felony warrants (P. 9-10, Petition for Writ of Certiorari); *Second*, both Judge Bohanon and the Circuit erred in their rulings on the nature of the bench warrant because it is neither a felony nor misdemeanor (P. 10-12, Petition for Writ of Certiorari); *Third*, the issue regarding the nature of bench warrants should have been certified to the Supreme Court or the Court of Criminal Appeals of the State of Oklahoma; and *Fourth*, the police officers should be entitled to qualified "good faith" immunity despite a stipulation of municipal liability for a finding of "any civil rights violation."

Petitioners' first argument is simply erroneous. The second and third arguments ignore existing Oklahoma law. The fourth argument seeks a rescue of the individual Petitioners (Defendants) from their stipulation

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[8](...continued)
Respondents' residence was also the residence of Deborah Boyd. Respondents claim it was not and therefore the search was also illegal under *Steagald v. United States*, 451 U.S. 204 (1981) (Search of third party home pursuant to arrest warrant held violative of Fourth Amendment). It was not necessary to resolve this issue under the ruling by the Tenth Circuit.

and would accomplish nothing since the Defendant City, which has no qualified immunity, would still be required to pay upon a finding of a civil rights violation for its practice, policy, custom or usage. Petitioners also raise certification to the state courts for the first time in this entire proceeding.

I.

THE TENTH CIRCUIT CORRECTLY FOUND THAT OKLAHOMA LAW DEFINES CONTEMPT AS A MISDEMEANOR FOR FOURTH AMENDMENT PURPOSES AND A BENCH WARRANT FOR FAILURE TO APPEAR IS A MISDEMEANOR WARRANT REQUIRING AN ENDORSEMENT BY A MAGISTRATE FOR SERVICE AT NIGHT.

Little would be gained here by reviewing the carefully crafted opinion of the Tenth Circuit that identifies a bench warrant for "failure to appear" as a misdemeanor warrant requiring a judicial endorsement for nighttime service. To be sure, as the Circuit points out, there is some confusion in Oklahoma between the Oklahoma Court of Criminal Appeals and the Oklahoma Supreme Court, but they are in accord on the thought that contempt was not a felony in Oklahoma contrary to the district court ruling. *O'Rourke v. City of Norman*, 875 F.2d at 1470 (P. 13, Appendix A, Petition for Writ of Certiorari). The analysis under Section II(B) of the

Tenth Circuit's opinion clearly and carefully traces the evolution of contempt and the various state court decisions ignored by the district court.

While the district court foraged outside the State of Oklahoma in order to classify contempt a felony, a simple analysis of Oklahoma Statutes suggests the rationale of the Oklahoma State courts in categorizing contempt as a misdemeanor. Copies of the relevant statutes cited herein are reproduced in full in Appendix A of this Response Brief.

Not even Petitioners (Defendants) should disagree with the notion that contempt is a public offense. 21 Okla. Stat. (1910) §3 provides that a crime or public offense is an act or omission forbidden by law and to which is annexed, upon conviction, various punishments, including imprisonment and a fine. Contempt is statutorily defined.[9] 21 Okla. Stat. (1910) §565. All crimes are "divided into felonies and misdemeanors." *Magnolia Pipeline Co. v. State*, 243 P.2d 369, 380 (Okla. Cr. 1952). Generally, any offense for which ". . . the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor." 21 Okla. Stat. (1910) §21. Prior to 1984, Oklahoma

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[9] It is relevant to note that Oklahoma has placed the definition for contempt and information regarding its punishment under Title 21 of its statutes entitled Crimes and Punishment. They are cataloged under Chapter 19, *Other Crimes Against Public Justice*. See 21 Okla. Stat. §565, *et seq.*

provided punishment for contempt as only a "fine or imprisonment." 21 Okla. Stat. (1981) §566. In 1984, a year after the incident at the O'Rourke home, the Oklahoma Legislature amended the contempt punishment statute to a "fine in a sum not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding six (6) months, or by both, at the discretion of the court." 21 Okla. Stat. (1984) §566. This subsequent enactment clearly brings contempt within the category of punishment for misdemeanors. See 21 Okla. Stat. (1910) §10.

It is useful to emphasize two additional factors from the analysis by the Tenth Circuit. First, the most analogous cases cited in analyzing "contempt for failure to appear" are perhaps the *Roselle* cases. *Roselle v. State*, 503 P.2d 1293 (Okla. Cr., 1972) (*Roselle I*); *Roselle v. State*, 509 P.2d 486 (Okla. Cr. 1973)(*Roselle II*). In these cases, originating out of the District Court of Cleveland County, an attorney was charged with *contempt for failure to appear*. The Oklahoma Court of Criminal Appeals held that contempt was a misdemeanor for purposes of appeal and post conviction relief. *Roselle I*, 503 P.2d at 1295 and *Roselle II*, 509 P.2d at 488. The holding that contempt was a misdemeanor was reversed only as to direct contempt since it was treated differently procedurally from indirect contempt and there was no advantage to continuing to classify direct contempt as a crime. See *Gilbert v. State*, 648 P.2d 1226, 1230-1 (Okla. Cr. 1982). Regardless, in *Gilbert*, contempt was still "*sui*

generis" or "of a criminal nature" *i.e.* quasicriminal. *Gilbert v. State*, 648 P.2d at 1230.

Petitioners now suggest that both the Tenth Circuit and the district court were wrong[10] and by implication, a bench warrant is not limited to the daytime service of a misdemeanor, but can be executed anytime of the day or night, much like a felony.

This is tantamount to reinstating the district court ruling that contempt was a felony. More incredibly, the logical progression of this argument suggests that Petitioners urge a "civil" or "hybrid" nature for a bench warrant that has broader scope in execution than a criminal misdemeanor warrant and can be used, as

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[10] Petitioners state, "Confusion over the nature of bench warrants in Oklahoma arises out of the fact that they are not clearly defined under Oklahoma statutory law, nor has their fundamental nature ever been considered by the courts of the State of Oklahoma. Given this confusion, if it was error for Judge Bohanon to rule that bench warrants for contempt of court were felony warrants, then it was equally erroneous for the Court of Appeals to rule that they are misdemeanors." (P. 10-11, Petition for Writ of Certiorari). This position represents an unstudied view of Oklahoma statutes and cases as the Tenth Circuit analysis shows. Oklahoma law defines bench warrants issued in felonies (22 Okla. Stat. (1910) §456) and for misdemeanors or bailable offenses (22 Okla. Stat. (1910) §457). The substantial difference between the two is the inclusion of a clause permitting bail for misdemeanors and bailable offenses. Still another section provides for a bench warrant issued when a defendant fails to appear for judgment after conviction. 22 Okla. Stat. (1910) §967 (See Appendix A for citation of relevant statutes).

occurred here, as a basis for an entry into the home. This is not in accord with this Court's decisions.[11]

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court held that absent exigent circumstances, a warrantless nighttime entry into an individual's home to make an arrest for a civil, nonjailable traffic offense was prohibited by the Fourth Amendment. Central to the decision was the concept that the state's classification of the offense as civil meant that the only interest of the state was the procurement of a specimen to test Defendant's blood alcohol content. This was not a sufficient exigent circumstance to support the home invasion.

This analysis in balancing the "gravity of the offense" against the Fourth Amendment mitigates in favor of

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[11] If any condition were to create the "significant, deleterious and perhaps erroneous impact on the use of bench warrants" that Petitioners carp about in their Question VI (P. *ii*, Petition for Writ of Certiorari), this argument would do it. It would require officers to distinguish between three (or perhaps more) types of warrants and to ascertain the service requirements for each. It seems demonstrably simpler to follow a scheme where felony warrants can be executed day or night and all other warrants (including misdemeanor warrants, civil bench warrants or other similar process) can be executed only during the day unless endorsed by a magistrate. Besides, this would parallel a statutory practice Oklahoma has followed since statehood with regard to the simple distinctions between felony and misdemeanor warrants. No serious effect can result if bench warrants and other similar process are treated similar to misdemeanors.

excluding the Petitioner police officers from the O'Rourke home, not, as Petitioners suggest, in favor of an invasion of the home. As much was recognized by the Tenth Circuit. *O'Rourke v. City of Norman*, 875 F.2d at 1471 (P. 16, Appendix A, Petition for Writ of Certiorari) ("The classification of contempt as *sui generis* does not vitiate this requirement, it strengthens it.").

In summary, there is substantial authority under Oklahoma law to support the Tenth Circuit view of Oklahoma law that contempt for failure to appear was, for Fourth Amendment purposes, a misdemeanor for which a bench warrant required a nighttime endorsement. Identification of a civil, nonjailable offense, under the decisions of this Court, mitigates in favor of greater protection within the home of the O'Rourkes.

II.

THE LANGUAGE OF PAYTON V. NEW YORK CITED BY PETITIONERS IS DICTUM AND REFERS TO A FELONY WARRANT. ENTRY INTO A HOME IS NOT JUSTIFIED BY THE EXISTENCE OF A MISDEMEANOR WARRANT.

Payton v. New York involves a warrantless, nonconsensual entry into a home for the purpose of making a routine felony arrest in the absence of exigent circumstances. Petitioners make a recitation regarding an "arrest warrant" at Page 10 of their Petition, but it is unreferenced as to where, in the holding of *Payton*, it

appears. Since *Payton* is a warrantless felony arrest, there is no portion of that holding that references an "arrest warrant." There is, however, dictum in *Payton* that discusses home entry with a felony arrest warrant. The Tenth Circuit referenced it in the quotation from its opinion recited by Petitioners at Page 9 of their Petition for Writ of Certiorari.

The dictum appears toward the end of this Court's opinion in *Payton*. If this be their reference, Petitioners are simply incorrect when they state the reference to arrest warrant is not limited to a felony warrant. The entire quotation is:

> If there is sufficient evidence of a citizen's participation in a **felony** to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an **arrest warrant** founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. (emphasis added)
>
> *Payton v. New York*, 445 U.S. at 602-3

As a threshold point, it should be remembered the Tenth Circuit held the search here was warrantless

because the bench warrant was invalid at night under state law.[12]

But, even if that question were not present, there is authority from within the contours of *Payton* as well as *Welsh v. Wisconsin*, 466 U.S. 740 (1984) that compels consideration of the "gravity of the offense" as an important part of the calculus of determining under what circumstances a warrantless entrance into a home may occur. *Welsh* involved a warrantless, nighttime entry into a home to arrest a defendant suspect involved in a car accident. This Court held that entry into the home could not be made for a civil, nonjailable offense.

Payton dwells on the felony aspects of its holding, but discusses many civil and minor offense cases in its footnotes. For example, at Footnote 43, the Court quotes the 13th Yearbook of Edward IV (1461-1483), at folio 9, ". . there is a recorded holding that it was unlawful for a sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party."

Footnote 45 in *Payton* quotes Lieber in his work on *Civil Liberty and Self-Government*, 62, speaking of the English law in this respect, "no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and

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[12] This Court has recognized as "a basic principle of Fourth Amendment law," that searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. at 586.

then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon."

And finally, no brief historical tour of the footnotes would be complete without reference to Footnote 12 in *Welsh* which specifically identifies the gravity of the offense as a significant issue before Fourth Amendment values may be impinged:

> Even the dissenters in *Payton*, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests. . . (White, J., dissenting) ("The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes." (Citation omitted)

Welsh v. Wisconsin, 466 U.S. 740, at Footnote 12.

In short, the gravity of the offense is a significant factor and Respondents contend that either a bench warrant or a misdemeanor warrant will not support a search of a home incident to that warrant. If "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Payton v. New York*, 445 U.S. at 585-6, then this case is a classic example of how to transform a bench warrant or misdemeanor warrant into the "general warrant" so

dreaded by the founding fathers. Just like this Court's consideration in *Steagald* that the use of an arrest warrant for third party home searches creates a "significant potential for abuse" and "may serve as the pretext for entering a home in which police have a suspicion, but not probable cause to believe that illegal activity is taking place," *Steagald v. United States*, 451 U.S. at 215, so does the pernicious policy of entry into the home incident to a misdemeanor or bench warrant create that same "potential for abuse." The governmental interest in the apprehension of misdemeanants is not outweighed by the special protections of the Fourth Amendment. To the extent Petitioners suggest cases that permit this invasion, it is Respondents' position they are wrongly decided.

Here, police officers used the flimsiest of probable cause coupled with a minor offense to achieve an entry into the home of the O'Rourkes. They found nothing. Such a case can only be addressed by a civil rights action because there was no other ongoing proceeding to which the O'Rourkes were a party where they could air their complaint of invasion. The officers could return numerous times with "probable cause," enter the home and, if they find nothing, still not make a return on the warrant and the "principal evil of physical entry into the home" continues. Thus the execution of misdemeanor and bench warrants in a home search context parallels the general warrant so unpopular during the days prior to the Republic.

III.

THESE DEFENDANTS ENTERED INTO A STIPULATION FOR A SPECIFIED AMOUNT OF DAMAGES WHICH, IN EFFECT, WAS A WAIVER OF QUALIFIED IMMUNITY. REGARDLESS, THE LAW OF WARRANT INVALIDITY FOR NIGHTTIME SERVICE WAS CLEARLY ESTABLISHED.

Petitioners suggest that Respondents (Plaintiffs) did not raise the issue of qualified immunity waiver on appeal, yet cite to the argument raised in Plaintiffs-Appellants' Brief-in-Chief (P. 7, Petition for Writ of Certiorari). Not only did the Respondents raise the question of qualified immunity in the Court of Appeals, they also asserted in the district court that the effect of the damage stipulation was a waiver of qualified immunity.[13] (R/A, Doc. 89, filed 2/20/86, pp. 27-30).

Petitioners now seek rescue from this Court from their willful, judicially entered stipulation. There is no substantial merit to a request for the use of this Court's limited judicial resources to review a unique and factually

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[13] On the day of the stipulation on February 3, 1986, Judge Bohanon ordered additional briefing on several issues, including qualified immunity. In their Supplemental Trial Brief, Respondents (Plaintiffs) asserted and argued in Proposition VIII that the stipulation of damages constituted a waiver of qualified immunity. (R/A, Doc. 89, filed 2/20/86, pp. 27-30).

limited case which exposes Petitioners to a maximum liability for damages of only $4,000.00 plus interest.

Besides, the stipulation provided a substantial advantage to Petitioners at the time of its entry. They obtained a waiver of jury trial in exchange for a limitation of liability.[14] As the Circuit points out, Petitioners chose not to abandon the stipulation even through the time of filing of appellate briefs. *O'Rourke v. City of Norman*, 875 F.2d at 1475 (P. 27, Appendix A, Petition for Writ of Certiorari). Though not reflected in the record, a question was directed from the panel at oral argument asking if both parties still agreed to the stipulation. The Circuit found the stipulation acted, in effect, as a waiver of qualified immunity. It is also, in effect, an admission that the home search here was a

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[14] The certainty of a stipulated damage amount can be an advantage when weighing possible risks with a jury. In hindsight, and in consideration of the district court ruling in this case, it was no gamble and an early significant advantage to Petitioners. But there are better examples of the inherent risks. For example, a recent Tenth Circuit case affirmed an award totalling $235,000.00 arising out of an alleged unlawful search of a home and office. *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987). Factually, the cases are very similar. Although certain threats were made by the officers, no apparent physical injuries resulted. While there is a difference regarding the proof of damages between *Specht* and *O'Rourke*, there is, nonetheless, an intriguing contrast that makes a stipulation of damages of $4,000.00 appear paltry, at best. No doubt, in consideration of the final result, counsel for Jensen would probably have traded a jury trial for a stipulation of $4,000.00 damages.

policy. Regardless of the stipulation, as has been argued herein (and as shown by the Tenth Circuit's analysis of Oklahoma law), the requirement for a "day or night" endorsement for nighttime service of a bench warrant was clearly established by Oklahoma law. Although there may not be a singular case that shows that bench warrants require night endorsement in Oklahoma, overall there is sufficient guidance since ". . . in light of preexisting law the unlawfulness (is) apparent."[15] *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987)

Petitioners also assert these officers are entitled to a "qualified good faith immunity" when they perform their duties in reliance on their training and procedures of the governmental entity to which they are responsible[16] (P.

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[15] Even if we apply the "reasonable officer standard" to these individual Defendants, they still flunk the test. The illegality of the bench warrant for nighttime service was recognized by Darian DeBolt, their Patrol Supervisor, in his investigation of the incident. "Captain DeBolt declared the search of the O'Rourke home illegal because the *warrant was improperly served in the nighttime*." *O'Rourke v. City of Norman*, 875 F.2d at 1469; P. 9, Appendix A, Petition for Writ of Certiorari) (emphasis added).

[16] This argument by Petitioners is tantamount to an admission that the officers' actions were in accordance with a policy, practice, custom or usage of the Defendant City since training is, in its purest form, the official policy of the City. The failure to train police officers to require night endorsements for bench warrants could amount to gross negligence in training, thereby warranting liability. *City of Canton, Ohio v. Harris*, 489 U.S. ____, 103 L.Ed. 412 (1989).

14-5, Petition for Writ of Certiorari). This, does not, however, fit the objective calculus of qualified immunity. The officers' subjective expectations regarding their training and the lawfulness of their acts are irrelevant to an analysis of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. at 3040. To that extent, Petitioners' assertions are a misstatement of the law of qualified immunity. Besides, even if they did rely on their training, a longtime, widespread practice is not immune from constitutional scrutiny. *Payton v. New York*, 445 U.S. at 600.

Finally, it is necessary to address the relevance, if any, of the presence of the word "FORTHWITH"[17] on the Bench Warrant. (Questions Presented II and III and Pages 4 and 10, Petition for Writ of Certiorari). Petitioners claim, in effect, that the singular presence of this word on the warrant and its invocation of immediacy can sweep away the protections of the Fourth Amendment, neutralize other state statutory protection schemes and immunizes the officers from concern over a nighttime service.

Petitioners' suggestion borders on the frivolous, if not the ridiculous. The word "forthwith" is a term of art with

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[17] There is only one statutory section which defines a criminal arrest warrant. 22 Okla. Stat. (1910) §172. This same form is used for both felony and misdemeanor warrants. As an aside, "Forthwith" is not capitalized in this Oklahoma statutory form nor was it on the Bench Warrant for Boyd. §172 is reproduced in its entirety in Appendix A to this Brief in Response.

limited relevance or relationship to the distinction between daytime versus nighttime warrant service. Under the Oklahoma statutory form for warrants, both felony and misdemeanor arrest warrants contain the word "forthwith." 22 Okla. Stat. (1910) §172 (See Appendix A). Not surprisingly, there is no requirement in 22 Okla. Stat. (1910) §189 (or any other statute for that matter) that requires the form of the warrant be modified to remove the word "forthwith" for a daytime only warrant.

There are three statutory forms for bench warrants under Oklahoma Law: 22 Okla. Stat. (1910) §456 (Form of bench warrant for a felony); 22 Okla. Stat. (1910) §457 (Form of bench warrant for a misdemeanor or bailable felony); and 22 Okla. Stat. (1910) §967 (Form of bench warrant for a failure to appear after judgment when personal attendance is necessary) (See Appendix A). **All three** (including the misdemeanor bench warrant) include the word, "forthwith" in their text. It is reasonable to conclude that the statutory scheme contemplates a distinction between day and night service without unnecessary emphasis on the term, "forthwith."

A comparison between the Bench Warrant for Deborah Boyd (Appendix C, Petition for Writ of Certiorari) and the statutory sections cited shows it most closely parallels 22 Okla. Stat. §457, the form for a misdemeanor or bailable felony.

To suggest that "forthwith" means an arrest can take place any time of the day or night is to suggest that this single word repeals the protection of §189 which requires a "day or night" endorsement for misdemeanor warrants.

In summary, if there is a distinction of relevance, it is not explicit under Oklahoma law.

CONCLUSION

For the reasons and argument provided herein, Michael O'Rourke, Shirley M. O'Rourke and Kathleen O'Rourke, respectfully request that certiorari be denied.

In the event of acceptance of certiorari and modification or discarding of the Tenth Circuit judgment that warrant invalidity under state law rendered the search illegal, Respondents urge this Court to affirm the decision based upon the theory that a bench warrant can not be used as the basis for a nighttime search of a home absent exigent circumstances.

Alternatively, Petitioners seek summary affirmance of the decision of the Tenth Circuit as a proper statement of both Fourth Amendment law and the federalism implicit under the Tenth Amendment.

Respectfully submitted,

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September 20, 1989

APPENDIX

APPENDIX A - Text of relevant Oklahoma Statutes.

APPENDIX A

The following are relevant Oklahoma Statutes cited in the text of this Response Brief:

Title **21 Okla. Stat.** (1910) **§3.** *Crime and public offense defined*

> A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments:
>
> 1. Death;
> 2. Imprisonment;
> 3. Fine;
> 4. Removal from office; or,
> 5. Disqualification to hold and enjoy any office of honor, trust, or profit, under this state.

Title **21 Okla. Stat.** (1910) **§10.** *Punishment of misdemeanor*

> Except in cases where a different punishment is prescribed by this chapter or by some existing provisions of law, every offense declared to be a

misdemeanor is punishable by imprisonment in the county jail not exceeding one (1) year or by a fine not exceeding Five Hundred Dollars ($500.00), or both such fine and imprisonment.

Title **21 Okla. Stat.** (1910) **§21**. *Prohibited act a misdemeanor, when*

Where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor.

Title **21 Okla. Stat.** (1910) **§565**. *Contempts, direct and indirect–Definition*

Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and willful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be deemed direct contempt of court, and may be summarily punished as hereinafter provided for. Indirect

contempts of court shall consist of willful disobedience of any process or order lawfully issued or made by court; resistance willfully offered by any person to the execution of a lawful order or process of a court.

Title **21 Okla. Stat.** (1981) **§566.** *Punishment*

Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court.

Title **21 Okla. Stat.** (1984) **§566.** *Punishment*

Unless otherwise provided for by law, punishment for direct or indirect contempt shall be by the imposition of a fine in a sum not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding six (6) months, or by both, at the discretion of the court.

Title **22 Okla. Stat.** (1910) **§172.** *Form of warrant*

A warrant of arrest is an order in writing, in the name of the State, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of _____
The State of Oklahoma,

To any sheriff, constable, marshal or policeman in this State (or in the county of _____ as the case may be):

Complaint upon oath having been this day made before me that the crime of (designating it) has been committed, and accusing C.D. thereof, you are therefore commanded forthwith to arrest the above named C.D. and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at _____ this _____ day of _____, 191___.

E.F., Justice of the Peace (or as the case may be.)

Title **22 Okla. Stat.** (1910) **§189.** *Arrest, when made*

If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant.

Title **22 Okla. Stat.** (1910) **§456.** *Bench warrant, form of, in case of felony*

The bench warrant must, if the offense is a felony, be substantially in the following form:

County of . . . . . .
State of Oklahoma

To any Sheriff, constable, policeman, or marshal in this State:

An indictment having been found (or information filed) on the . . . . day of . . . . . A.D., 19 . . ., in the district court in and for the county of . . . . . , charging C.D. with the crime of . . . . . ., (designating it generally) you are therefore commended forthwith to arrest the above named C.D., and bring him before the court (or before the court to which the indictment or information may have been removed, naming it) to answer said indictment or information; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of . . . . . .

Given under my hand, with the seal of said court affixed this . . . . . day of . . . . . A.D., 19. . . .

By order of the court.

E. F., Clerk.

(Seal)

Title **22 Okla. Stat.** (1910) **§457.** *Bench warrant in case of misdemeanor or bailable felony*

If the offense is a misdemeanor or a bailable felony, the bench warrant must be in a similar form, adding to the body thereof a direction to the following effect:

Or, if he requires it that you take him before any magistrate in that county or in county in which you arrest him, that he may give bail to answer the indictment or information.

Title **22 Okla. Stat.** (1910) **§967.** *Form of bench warrant*

The bench warrant must be substantially in the following form:

County of . . . . . .
State of Oklahoma.

To any sheriff, constable, marshal or policeman in this state:

A.B. having been, on the . . . . day of . . . . ., A.D., 19. . ., duly convicted in the . . . . . court of the county of . . . . . of the crime of (designating it generally), you are therefore commanded forthwith to arrest the above named A B and bring him before that court for judgment, or if the court has adjourned for the term, you are to deliver him into the custody of the sheriff of the county of . . . . . (as the case may be).

Given under my hand, with the seal of said court affixed, this . . . . day of . . . . . A.D., 19 . . .

By order of the court.

E. F., Clerk

(Seal.)